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VENTURA FOODS, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VENTURA FOODS, LLC,

Plaintiff,

v.

SUPREME OIL COMPANY,
INCORPORATED a.k.a. ADMIRATION
FOODS,

Defendant.

07 CV 7338 (PKC) (MHD)

**DECLARATION OF
ANGIE YOUNG KIM**

I, ANGIE YOUNG KIM, declare under penalty of perjury:

1. I am an attorney duly admitted to this Court. I am associated with the firm Pillsbury Winthrop Shaw Pittman LLP, attorneys for plaintiff Ventura Foods, LLC in the above matter. I affirm that the following is true.
2. Attached hereto as Exhibit A is a true and correct copy of the transcript of the 10/11/07 deposition of Terry Splane, excluding pages 28-34 which have been redacted based on Ventura's designation of those pages as "Confidential – Attorneys' Eyes Only" pursuant to the 9/28/07 Stipulation and Order for the Production and Exchange of Confidential Information.

3. Attached hereto as Exhibit B is a true and correct copy of an email from Thomson CompuMark to Pillsbury Winthrop Shaw Pittman LLP dated May 21, 2007.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2007

A handwritten signature in cursive script, appearing to read "Angie Young Kim", is written over a horizontal line.

Angie Young Kim

EXHIBIT A

Condensed Transcript and Word Index of
TERRY SPLANE

Case: VENTURA FOODS, LLC vs. SUPREME OIL COMPANY, et
al.

Date: October 11, 2007

Reported by Steven W. Cornwell, CSR No. 7193

Bob Diehl & Associates
Certified Court Reporters
Phone: (805) 495-8919
Fax: (805) 495-6001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VENTURA FOODS, LLC,)
)
Plaintiff,)
)
vs.) No. 07 CV 7338
)
SUPREME OIL COMPANY,) (PKC) (MHD)
INCORPORATED a.k.a.)
ADMIRATION FOODS,)
)
Defendants.)
)
_____)

Deposition of TERRY SPLANE, taken on behalf of
the Defendant, at 5670 Wilshire Boulevard,
21st Floor, Los Angeles, California,
commencing at 9:04 a.m., on Thursday, October

11, 2007, before Steven W. Cornwell, CSR 7193,

RPR, a Certified Shorthand Reporter in and for

the County of Los Angeles, State of

California, pursuant to Notice.

APPEARANCES:

FOR THE PLAINTIFF:

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Bob Diehl & Associates (805) 495-8919 2

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QUESTIONS MARKED
 (None)

INFORMATION REQUESTED
 (None)

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1 Q You were a business major?

2 A Business, economics, yes.

3 Q Did you go to graduate school?

4 A Did not.

5 Q Is that your last degree?

6 A Yes.

7 Q Okay.

8 And your first job after college?

9 A Selling biomedical lab supplies for Curtin

10 Matheson & Associates.

11 Q So up until the present you have been involved

12 in business?

13 A Yes, sir.

14 Q How long in the food business?

15 A Since '86, '87.

16 Q And how long at Ventura?

17 A Just over two years.

18 Q And did you start there as a vice president?

19 A Correct.

20 Q And your duties when you started are your

21 current duties now?

22 A Correct.

23 Q And what are those duties?

24 A Overseeing the entire marketing department,

25 from category management, product management, training,

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1 LOS ANGELES, CALIFORNIA; THURSDAY, OCTOBER 11, 2007

2 9:04 a.m.

3

4 TERRY SPLANE,

5 having declared under penalty of perjury to tell

6 the truth, was examined and testified as follows:

7

8 EXAMINATION

9 BY MR. LUTHER:

10 Q Will you state your full name, please, and

11 spell it out for the court reporter.

12 A Sure. Full legal name is William Terence

13 Splane. W-i-l-l-i-a-m, T-e-r-e-n-c-e, S-p-l-a-n-e.

14 Q And your business address is?

15 A 40 Pointe, P-o-i-n-t-e, Drive, Brea,

16 California 92821.

17 Q And could you just give me your educational

18 background. College?

19 A Washington State University.

20 Q Graduated?

21 A Yes.

22 Q Year?

23 A '84.

24 Q Business major?

25 A Yes.

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1 new product development, media communications.

2 Q What did you do preceding Ventura?

3 A Similar job responsibilities for McCormick &

4 Company in Baltimore -- or Hunt Valley, Maryland.

5 (Discussion held off the record.)

6 MR. LUTHER: Exhibit -- deposition Exhibit 1,

7 notice of deposition, 30(b)(6). I just have one copy.

8 Maybe I have two. I do.

9 (Defendant's Exhibit 1 was marked

10 for identification by the Certified

11 Shorthand Reporter.)

12 BY MR. LUTHER:

13 Q May I direct your attention to Schedule A, the

14 last page -- or second to the last page, topics of

15 deposition.

16 Do you see this?

17 A Yes.

18 Q Have you seen this before?

19 A I believe so, yes.

20 Q Are you prepared to testify to each of the 15

21 topics with knowledge as a spokesman for Ventura?

22 MR. GARRETT: To the extent that we are here

23 for a 30(b)(6) and Mr. Splane has been designated as

24 the representative of Ventura on these topics, we will

25 represent that, yes, he is.

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1 MR. LUTHER: Okay.
2 Now I'm going to ask the deponent, and not the
3 attorney, for a "Yes" or "No."
4 Q Are you prepared to testify with knowledge as
5 to each the topics listed in schedule A? "Yes" or
6 "No."
7 MR. GARRETT: You can answer the question to
8 the extent you can.
9 THE WITNESS: I will -- yeah, I will testify
10 to the extent I can. There are areas on here where I
11 have no knowledge.
12 BY MR. LUTHER:
13 Q Let's go down one by one. Which areas do you
14 not have knowledge as to number one?
15 MR. GARRETT: Well, is there a question
16 regarding the topic? You've designated the topics.
17 And we are representing that --
18 MR. LUTHER: Okay. The deponent just stated
19 that he cannot testify to certain areas. We are going
20 to find out what those areas are, start with number
21 one, go to number two, go down the list.
22 Q We will start with number one. Which areas
23 can you not testify to here?
24 MR. GARRETT: Objection to the extent it
25 misstates the prior testimony.

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1 MR. LUTHER: You can answer.
2 MR. GARRETT: If you understand the question,
3 go ahead and answer.
4 Can I rephrase? I think it's still a vague
5 question.
6 Can you answer -- are you asking can he answer
7 questions regarding topic one?
8 MR. LUTHER: I'll tell you what. I will hold
9 this question for later. Let's go on to the next
10 question.
11 MR. GARRETT: Okay.
12 BY MR. LUTHER:
13 Q What did you do to prepare for this
14 deposition?
15 A Spent some time on the phone yesterday with
16 Jim and other counsel, primarily going over these
17 topics and --
18 MR. GARRETT: You can answer to the extent you
19 are not --
20 MR. LUTHER: Wait a second. There is no --
21 for the record, there is no coaching the witness ever.
22 Okay? Ever. And that is solid in the rules.
23 MR. GARRETT: Counsel --
24 MR. LUTHER: Now, let's start again.
25 Q What have you done to prepare for this

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1 deposition?
2 MR. GARRETT: Counselor?
3 MR. LUTHER: Yes.
4 MR. LUTHER: Do not raise your voice to me,
5 first of all. Second of all, I am well aware of the
6 rules. Third of all, I am not counseling the witness.
7 What I'm saying is I was making an objection which is a
8 totally valid objection based on the attorney/client
9 privilege.
10 The witness started to testify as to what he
11 may or may not have said to me yesterday on the
12 telephone. I was advising him, as I am entitled to do,
13 not to reference any comments he may have had with me
14 or other with counsel in this case.
15 Are we clear?
16 MR. LUTHER: Noted.
17 Q Were you asked to look for any documents to
18 prepare for this deposition?
19 A To look for any documents, no.
20 Q When were you told about today's deposition?
21 A Tuesday afternoon.
22 Q When were you first told to prepare for
23 today's deposition?
24 A I don't recall.
25 Q Who told you to prepare for this deposition?

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1 MR. GARRETT: Objection to the extent it calls
2 for the disclosure of attorney/client communication.
3 MR. LUTHER: You can answer.
4 MR. GARRETT: If you can answer to the extent
5 it does not call for disclosure of attorney/client
6 communication.
7 MR. LUTHER: So answer.
8 Q Who told you? Who is not legal content. Who
9 told you? You can answer that.
10 MR. GARRETT: You can answer the question.
11 THE WITNESS: Would have been legal counsel
12 internally at Ventura Foods.
13 BY MR. LUTHER:
14 Q And what's their name?
15 A Would have been Kathy Riley.
16 Q Kathy Riley?
17 A Correct.
18 Q Is she a trademark attorney?
19 A She is not.
20 Q What kind of attorney is she?
21 A I believe she's a paralegal.
22 Q So there wasn't attorney/client privilege. A
23 paralegal told you. A paralegal prepared you for this
24 deposition; is that correct?
25 MR. GARRETT: Objection. That's

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1 argumentative. And there is an attorney/client
 2 communication between representatives of the legal
 3 department of Ventura Foods.
 4 BY MR. LUTHER:
 5 Q Do you know what a trademark is?
 6 A Sure.
 7 Q What's a trademark?
 8 A Protects --
 9 MR. GARRETT: Objection to the extent it calls
 10 for a legal conclusion and/or expert testimony.
 11 To the extent you can answer, you may answer.
 12 BY MR. LUTHER:
 13 Q What's a trademark?
 14 A In my opinion, not legal or professional, is
 15 protection of an owned property of an organization.
 16 Q What's trade dress?
 17 MR. GARRETT: Same objection.
 18 MR. LUTHER: You can answer.
 19 MR. GARRETT: To the extent you can answer.
 20 THE WITNESS: The overall field equity essence
 21 of a brand.
 22 MR. LUTHER: Okay.
 23 So you will testify you didn't look for any
 24 documents for today's deposition, and so we have not
 25 been -- for the record, we have not been provided any

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1 documents which, you know, is in default of the judge's
 2 order of the other day. You were to provide documents
 3 by 5:00 o'clock yesterday, which you failed to do. I
 4 just want to put that on the record.
 5 MR. GARRETT: Objection to the extent it
 6 misstates the prior testimony. And, again, for the
 7 record, are there any document requests attached to
 8 this deposition subpoena? I don't see any.
 9 MR. LUTHER: Okay. Exhibit 2 to the
 10 deposition.
 11 (Defendant's Exhibit 2 was marked
 12 for identification by the Certified
 13 Shorthand Reporter.)
 14 MR. GARRETT: Is this a copy for me?
 15 MR. LUTHER: Yes.
 16 Q Have you seen this request for documents
 17 before?
 18 MR. GARRETT: For the record, this is an
 19 unsigned copy. Is this a copy that was served?
 20 MR. LUTHER: Yes.
 21 MR. GARRETT: And in that it's not signed,
 22 what date was this served?
 23 BY MR. LUTHER:
 24 Q Have you seen this copy -- have you seen this
 25 request for documents before?

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1 MR. GARRETT: Can we go off the record,
 2 please. Are we off the record?
 3 THE REPORTER: Are we off the record?
 4 MR. LUTHER: We can go off the record.
 5 (Discussion held off the record.)
 6 MR. LUTHER: Go back on the record.
 7 We are going to make this -- I am going back
 8 on. You are refusing to answer the question? We are
 9 going to the next one. Okay.
 10 I want to make this Exhibit 3. This is the
 11 judge's order.
 12 MR. GARRETT: Counselor, for the record --
 13 MR. LUTHER: I withdraw the question.
 14 MR. GARRETT: Off the record.
 15 MR. LUTHER: Yeah.
 16 (Discussion held off the record.)
 17 MR. LUTHER: I withdraw the question.
 18 Back on the record.
 19 MR. GARRETT: No.
 20 MR. LUTHER: Per the court's order --
 21 MR. GARRETT: Off the record.
 22 If you want to have this on the record, I will
 23 gladly --
 24 MR. LUTHER: Put it on the record.
 25 MR. GARRETT: Fine. On the record.

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1 Mr. Luther, you and I have never met before.
 2 However, this deposition is starting off quite
 3 aggressively for no reason. I've asked you a couple of
 4 questions off the record regarding this document, which
 5 you just marked as Exhibit 2 to this deposition. It is
 6 an unsigned document. It is also blank dated.
 7 MR. LUTHER: Okay.
 8 MR. GARRETT: I simple asked you a question as
 9 to --
 10 MR. LUTHER: I don't recall. I told you I
 11 don't recall.
 12 MR. GARRETT: Okay. Fine.
 13 Are you withdrawing and taking Exhibit 2 off
 14 the record? Or is this simply a document you are going
 15 to introduce into the record and --
 16 MR. LUTHER: I am going to withdraw the
 17 question.
 18 MR. GARRETT: Okay.
 19 MR. LUTHER: I'm going to go to the next one.
 20 Here is -- we will leave two blank. Here is Exhibit 3.
 21 We are back on the record; right?
 22 (Defendant's Exhibit 3 was marked
 23 for identification by the Certified
 24 Shorthand Reporter.)
 25 BY MR. LUTHER:

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1 Q Here is the judge's order. Plaintiff shall
2 respond to defendant's document request, so and so and
3 so and so. Have you seen this order before?
4 MR. GARRETT: Do you have a copy for me?
5 MR. LUTHER: We will make some copies.
6 MR. GARRETT: Okay. Hold on one second.
7 MR. LUTHER: Or you can keep that, we will
8 just get another copy.
9 MR. GARRETT: Hold on one second, please.
10 THE REPORTER: That's the marked copy. So
11 that's attached to the record.
12 MR. GARRETT: That's fine.
13 MR. LUTHER: So you haven't seen this order
14 before?
15 MR. GARRETT: Counselor, you just handed me
16 what's marked as Exhibit 3, and I'm reading it. If I
17 could please have time to read it. Thank you.
18 MR. LUTHER: Where are the documents? You
19 haven't produced documents.
20 MR. GARRETT: Counselor, --
21 MR. LUTHER: There is a court order.
22 MR. GARRETT: Counselor, first of all, I told
23 you a few moments ago, do not raise your voice to me.
24 Second of all, I am reading this document, as
25 I'm entitled to do.

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1 MR. LUTHER: So it's apparent you are in
2 default.
3 MR. GARRETT: I am not going to show this
4 document to my client until I have an opportunity to
5 read it, being that you just handed me a multiple --
6 it's an email that's was faxed twice apparently. And
7 the last document you showed me is blank, et cetera.
8 And you are being badgering --
9 MR. LUTHER: Okay.
10 MR. GARRETT: -- to the extent -- it's
11 unbelievable --
12 MR. LUTHER: All right.
13 MR. GARRETT: -- at this point.
14 MR. LUTHER: Are you refusing to answer?
15 MR. GARRETT: I don't need to answer anything
16 today.
17 MR. LUTHER: Okay. We are going on to the
18 next question.
19 Q Have you been in a trademark lawsuit before?
20 A No.
21 MR. GARRETT: Excuse me.
22 BY MR. LUTHER:
23 Q Have you testified --
24 MR. GARRETT: Mr. Reporter, we are going off
25 the record.

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1 MR. LUTHER: No, no. We are on the record.
2 We are on to the next question.
3 MR. GARRETT: Then mark for the record that my
4 client and I are getting up from the table and going
5 outside for a brief moment. And I am going to take
6 Exhibit 3 with me so I can read it in peace, please.
7 Thank you.
8 MR. LUTHER: We may have to go to a second day
9 of depositions.
10 MR. GARRETT: Fine. You want to try to get a
11 judge to order a second day of deposition because you
12 won't let me read a document you introduced as
13 evidence?
14 MR. LUTHER: That's a court order. You are
15 supposed to have read it before you come in here.
16 MR. GARRETT: I am not supposed to have read
17 anything before I came --
18 MR. LUTHER: You didn't read the court's
19 order?
20 MR. GARRETT: Counselor, I am going out of the
21 room now. Thank you.
22 (Brief recess.)
23 MR. LUTHER: Where are we?
24 MR. GARRETT: For the record, I have reviewed
25 Exhibit 3 if you have any questions about it.

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1 MR. LUTHER: Okay.
2 Q Where are the documents? Where are the
3 documents that Ventura was supposed to produce
4 according to the court order?
5 MR. GARRETT: To the extent you can answer the
6 question, feel free.
7 THE WITNESS: I have no knowledge of this
8 document.
9 MR. LUTHER: Okay. Let's go back to what was
10 marked Exhibit 2, the -- I believe the defendant's
11 request for production of documents and things.
12 Q Do you have any knowledge of that document?
13 MR. GARRETT: We are referring back to the
14 Exhibit 2 --
15 MR. LUTHER: Yes.
16 MR. GARRETT: -- that's the blank?
17 MR. LUTHER: Yes.
18 MR. GARRETT: Okay.
19 BY MR. LUTHER:
20 Q Do you have any knowledge of that document?
21 A I have never seen this document before.
22 Q Okay.
23 And how does your company police their
24 trademarks?
25 MR. GARRETT: Objection. Calls for

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1 speculation. And to the extent it calls for
 2 attorney/client and/or work product, I would object on
 3 those grounds.
 4 To the extent you can answer without
 5 disclosing attorney/client communications and/or work
 6 product, being attorney/client or attorney work
 7 product, you may answer.
 8 THE WITNESS: I have no idea what our
 9 official policies are associated with that.
 10 BY MR. LUTHER:
 11 Q How does your company learn of potential
 12 infringers?
 13 MR. GARRETT: Same objection. Calls for
 14 speculation and to the extent it calls for the
 15 disclosure of attorney work product or attorney/client
 16 communication.
 17 you can answer to the extent you can.
 18 THE WITNESS: From what I've seen, it's just a
 19 -- it's a reaction to information coming in from the
 20 field organization, as in this case.
 21 BY MR. LUTHER:
 22 Q And have you personally worked with your legal
 23 department in trademark matters before?
 24 A In trademark searches for potential new
 25 products or categories, yes.

Page 23

1 Q Okay.
 2 Do you work with a paralegal or a lawyer?
 3 A Both.
 4 Q You have an in-house legal team?
 5 A Yes.
 6 Q How many attorneys?
 7 A Two.
 8 Q Are they intellectual property attorneys?
 9 A I have no idea.
 10 Q Well, are they trademark attorneys?
 11 A I do not believe so.
 12 Q Okay.
 13 And I may have asked you this before. Have
 14 you testified in a lawsuit before?
 15 A I have not.
 16 Q How many had trademarks does Ventura own?
 17 MR. GARRETT: Objection to the extent -- calls
 18 for speculation. And the extent it calls for a legal
 19 conclusion.
 20 THE WITNESS: Couldn't wager a guess.
 21 MR. LUTHER: Okay. I will refine the
 22 question somewhat.
 23 Q How many trademarks does your company own for
 24 use with liquid shortening?
 25 MR. GARRETT: Same objection. Calls for

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1 speculation and calls for a legal conclusion.
 2 THE WITNESS: Don't know the exact number.
 3 MR. LUTHER: Okay.
 4 Q Now, what are the names of the different
 5 liquid shortening products made and distributed by
 6 Ventura?
 7 MR. GARRETT: It's a compound question. Calls
 8 for speculation.
 9 MR. LUTHER: Let me refine it.
 10 Q What are the names of the different liquid
 11 shortening products manufactured by Ventura?
 12 A Extend. Triumph. Chef's Pride.
 13 Q Which ones are clear?
 14 MR. GARRETT: Calls for speculation. It's
 15 also vague.
 16 MR. LUTHER: You can answer.
 17 MR. GARRETT: To the extent you can.
 18 THE WITNESS: In a number of the brands I
 19 mentioned there is an option of clear and creamy.
 20 BY MR. LUTHER:
 21 Q You mean a customer may order it either --
 22 A We have --
 23 Q -- clear --
 24 A We do have multiple choices under multiple
 25 brands, correct.

Page 25

1 Q Okay.
 2 Is Mel-Fry offered clear and in color?
 3 A It is not.
 4 Q Mel-Fry is only offered in clear?
 5 A Correct.
 6 Q And all those products that are manufactured
 7 are also distributed by your company; is that correct?
 8 A Sold to distributors, correct.
 9 Q Okay.
 10 Do you know of documents showing this?
 11 MR. GARRETT: Calls for speculation.
 12 MR. LUTHER: You can answer.
 13 MR. GARRETT: It's also vague.
 14 BY MR. LUTHER:
 15 Q Are there documents showing what products are
 16 made and distributed by your company?
 17 A Can you restate that question, please.
 18 Q Let's go to the next one.
 19 Who does Ventura sell liquid shortening
 20 products to?
 21 MR. GARRETT: Calls for -- objection. To the
 22 extent that it calls for the -- it's vague.
 23 Go ahead and answer it to the extent you can.
 24 THE WITNESS: Across multiple channels --
 25 retail, industrial, and food service.

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1 BY MR. LUTHER:
2 Q Who in retail?
3 A That's not a part of my sphere of
4 responsibility. So I can't specifically tell you the
5 customers.
6 Q By retail, what do you mean? Do you mean
7 restaurants?
8 A No. Retail would be consumers.
9 Q Oh. Individual consumers?
10 A Not to individual consumers. To retail stores.
11 Q Like a distributor that would sell to
12 individual consumers?
13 A A retail store.
14 Q Can you give me an example.
15 A Safeway.
16 Q Safeway. So somebody would go into Safeway
17 and buy your product?
18 A (No audible response.)
19 THE REPORTER: Excuse me?
20 MR. GARRETT: You need to have an audible
21 answer.
22 THE WITNESS: Oh. "Yes."
23 Not knowing if Safeway is a customer of ours
24 or not. Again, it's not my sphere of responsibility.
25 BY MR. LUTHER:

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1 Q So you wouldn't know if Costco is a customer?
2 A No.
3 Q What is your sphere of responsibility?
4 A Food service channel.
5 Q To commercial customers?
6 A To restaurants. Yes.
7 Q Okay.
8 And are there documents showing the
9 distribution of products from your company?
10 MR. GARRETT: Calls for speculation. It's
11 vague.
12 MR. LUTHER: You can answer.
13 MR. GARRETT: To the extent you know whether
14 or not there's documents in your company, go ahead.
15 THE WITNESS: Sure. We can go in the system
16 and pull the customer list.
17 MR. LUTHER: Okay.
18 Q And have these documents been provided?
19 MR. GARRETT: Objection. The witness does not
20 know what counsel has provided to you, as he has
21 already testified.
22 (The following portion of the deposition of
23 TERRY SPLANE is confidential pursuant to
24 stipulated protective order, Page 28 through
25 Page 34.)

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1
2 EXAMINATION (Continued)
3 BY MR. LUTHER:
4 Q What is the percentage of Ventura's business
5 pertaining to its Mel-Fry product?
6 MR. GARRETT: It's vague.
7 You can answer.
8 THE WITNESS: I'm sorry. The question again?
9 BY MR. LUTHER:
10 Q What is the percentage of Ventura's business
11 pertaining to its Mel-Fry product?
12 MR. GARRETT: Same objection. You can answer
13 to the extent you can.
14 MR. LUTHER: That's Mel, M-e-l, hyphen, F-r-y.
15 Mel-Fry.
16 MR. GARRETT: Also calls for speculation.
17 THE WITNESS: Don't know off the top of my
18 head.
19 BY MR. LUTHER:
20 Q Can you tell me what Mel-Fry sales percentage
21 of Ventura were last year?
22 MR. GARRETT: Still a vague question.
23 Go ahead.
24 THE WITNESS: I cannot.
25 BY MR. LUTHER:

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1 Q Can you tell me for any year?
2 A No.
3 Q Why can't you?
4 MR. GARRETT: It's argumentative.
5 MR. LUTHER: You can answer.
6 MR. GARRETT: To the extent you can answer the
7 question, feel free. Why can't you testify as to
8 something.
9 BY MR. LUTHER:
10 Q Why don't you know?
11 A I don't have that specific knowledge. It's --
12 it's a vast business, with a multitude of brands and
13 categories beyond shortening.
14 Q Weren't you designated as the official
15 spokesman for Ventura to testify today?
16 MR. GARRETT: Objection.
17 BY MR. LUTHER:
18 Q "Yes" or "No."
19 MR. GARRETT: Objection.
20 BY MR. LUTHER:
21 Q "Yes" or "No."
22 MR. GARRETT: I need my objection on the
23 record, please, --
24 BY MR. LUTHER:
25 Q "Yes" or "No."

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<p>1 MR. GARRETT: -- before you answer the 2 question. 3 MR. LUTHER: Okay. 4 MR. GARRETT: You are asking the witness 5 specific financial questions. He has been so 6 designated. However, if you would like to show him a 7 specific document, perhaps to refresh his recollection. 8 I believe those documents have been produced 9 in this litigation. 10 MR. LUTHER: We don't have the documents, and 11 you haven't produced them. Do you refuse to produce 12 them? "Yes" or "No." 13 MR. GARRETT: I'm not refusing to produce 14 anything, Counselor. 15 MR. LUTHER: Okay. 16 Q What were Mel-Fry's sales last year in 17 dollars? 18 MR. GARRETT: Gross sales? Net sales? 19 BY MR. LUTHER: 20 Q Gross sales. 21 A 75 million. 22 Q What percentage of sales is that of Ventura? 23 MR. GARRETT: It's -- it's still a vague 24 question. 25 You can answer to the extent you can.</p>	<p>1 competitors? 2 MR. GARRETT: "Yours" being Ventura's? 3 MR. LUTHER: Let me rephrase it. 4 Q What are the names of Ventura's largest 5 competitors? 6 A Cargill. ADM. ConAgra. 7 Q Is Supreme? 8 A Not one of our largest, no. 9 Q Okay. 10 Is -- would you say Supreme is a significant 11 competitor? 12 MR. GARRETT: Vague as to the term 13 "significant." 14 MR. LUTHER: You can answer. 15 THE WITNESS: The manufactures of competitors 16 that I stated before are national in scope. As it 17 relates to a specific region and territory, yes, 18 Supreme is in the northeast. New York specifically. 19 BY MR. LUTHER: 20 Q So Supreme is a significant competitor in the 21 northeast region of the country? 22 A (No audible response.) 23 Q "Yes"? 24 A Yes, that's where the name -- 25 Q Okay.</p>
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<p>1 THE WITNESS: In dollars? 2 MR. LUTHER: In dollars. 3 THE WITNESS: I'm not aware. 4 BY MR. LUTHER: 5 Q You don't know? 6 A (No audible response.) 7 Q Okay. 8 Is Mel-Fry a big part of Ventura's business? 9 A Yes. 10 Q Am I pronouncing it right -- Ventura? 11 A Yes, sir. 12 Q How big a part is Mel-Fry of Ventura's 13 business? 14 MR. GARRETT: Asked and answered. 15 MR. LUTHER: You can answer. 16 THE WITNESS: Similar to the last question. 17 It's stated a different way. 18 BY MR. LUTHER: 19 Q What are the names of your largest 20 competitors? 21 MR. GARRETT: Have you finished your previous 22 answer? Were you finished? 23 THE WITNESS: (No audible response.) 24 BY MR. LUTHER: 25 Q What are the names of your largest</p>	<p>1 A -- comes up. 2 Q Do you have any documents at Ventura to show 3 this answer? 4 MR. GARRETT: Calls for speculation. It's 5 also vague. 6 MR. LUTHER: "Yes" or "No." 7 Well, you can answer the question. 8 THE WITNESS: "No." 9 BY MR. LUTHER: 10 Q You don't have any documents at Ventura that 11 show who the largest competitors are. Is that correct? 12 MR. GARRETT: That's -- it's vague. Also 13 misstates the prior testimony. 14 BY MR. LUTHER: 15 Q Do you have any -- do you have documents at 16 Ventura? 17 A Yes. 18 Q Do you have documents showing who your 19 competitors are? 20 A We keep competitive intelligence, yes. 21 Q Okay. 22 Why haven't you produced those documents? 23 MR. GARRETT: Objection to the extent you are 24 asking the witness what has or has not been produced by 25 counsel, he may or may not be aware of that</p>

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1 information.
 2 BY MR. LUTHER:
 3 Q Did you provide those documents to your
 4 attorney?
 5 MR. GARRETT: Again, objection to the extent
 6 it calls for disclosure of attorney/client
 7 communication.
 8 MR. LUTHER: You are asking him not to -- you
 9 are instructing him not to answer that one?
 10 MR. GARRETT: I haven't said that.
 11 Can you read back the question.
 12 (Record read as follows:
 13 "Question: Did you provide those
 14 documents to your attorney?")
 15 MR. GARRETT: Those documents being documents
 16 showing competitive data?
 17 MR. LUTHER: Yes.
 18 MR. GARRETT: You can answer the question.
 19 THE WITNESS: I did not personally, no.
 20 BY MR. LUTHER:
 21 Q When Ventura sells liquid shortening to a
 22 customer, does the customer know who it's buying from?
 23 A Yes.
 24 Can I ask for your definition of a customer.
 25 MR. GARRETT: I'd like to interject a belated

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1 objection as calls for speculation.
 2 BY MR. LUTHER:
 3 Q How long has Mel-Fry been used, the mark?
 4 A I believe since the '60s, early '60s.
 5 Q Was that when it was owned by Durkee?
 6 MR. GARRETT: Calls for speculation.
 7 THE WITNESS: I'm not sure who owned the
 8 trademark at that point.
 9 BY MR. LUTHER:
 10 Q Now, are you familiar with the Mel-Fry design
 11 which is at issue in this lawsuit?
 12 A Yes.
 13 Q How long has that design been in use?
 14 MR. GARRETT: Again, calls for speculation.
 15 THE WITNESS: Do not know.
 16 BY MR. LUTHER:
 17 Q So you can't tell me when it was first used?
 18 A I'm not aware of any design modifications over
 19 the continuum life of Mel-Fry.
 20 Q So it's your impression or to your personal
 21 knowledge the design in use today was the design first
 22 used?
 23 MR. GARRETT: Objection. Misstates the prior
 24 testimony. In addition --
 25 MR. LUTHER: We have a new question here.

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1 MR. GARRETT: No, let me finish my objection.
 2 MR. LUTHER: Finish.
 3 MR. GARRETT: To the extent you are asking the
 4 witness multiple questions that are outlined in his
 5 declaration, I would ask that you show him the
 6 declaration. Perhaps it will refresh his recollection.
 7 You are asking him identical questions he's already
 8 testified to in his declaration, multiple declarations.
 9 You may ask your next question.
 10 BY MR. LUTHER:
 11 Q So how many versions of the Mel-Fry label have
 12 there been?
 13 MR. GARRETT: Calls for speculation.
 14 MR. LUTHER: You can answer.
 15 THE WITNESS: Since I've been involved in the
 16 business, one. I have no idea prior to that.
 17 BY MR. LUTHER:
 18 Q And that one is the one at issue in the
 19 lawsuit?
 20 A (No audible response.)
 21 THE REPORTER: Excuse me?
 22 THE WITNESS: "Yes."
 23 MR. GARRETT: Let me back up since Mr. Luther
 24 did not provide you with this information in the
 25 beginning. The court reporter is taking down all of

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1 the information, everything that is said in the room
 2 today. And you need to give Mr. Luther the courtesy of
 3 finishing his question before you give an answer. And,
 4 likewise, he will of course do the same.
 5 If you don't understand a question, you should
 6 ask that he rephrase the question. Otherwise the court
 7 reporter and Mr. Luther will assume you understood the
 8 question.
 9 THE WITNESS: Understood.
 10 MR. GARRETT: So he can only take down verbal
 11 responses. So to the extent you have your hand over
 12 your mouth or you nod your head, he can't take that
 13 down. So you need to say it audibly.
 14 Understood?
 15 THE WITNESS: Yes, sir.
 16 MR. GARRETT: And we will all try to talk
 17 slowly and not talk over each other.
 18 MR. LUTHER: Are we back on the record? Are
 19 we on the record?
 20 MR. GARRETT: We are on the record.
 21 BY MR. LUTHER:
 22 Q How long has the term "fry" been used by
 23 Ventura?
 24 MR. GARRETT: Objection. Calls for
 25 speculation. It's also vague.

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1 MR. LUTHER: You can answer.
 2 MR. GARRETT: Are you referring to in the
 3 Mel-Fry term or in Ventura in any context?
 4 MR. LUTHER: Any context.
 5 MR. GARRETT: You can answer.
 6 THE WITNESS: I can only answer to the extent
 7 on the Mel-Fry that would have been since the
 8 acquisition in the late '90s.
 9 BY MR. LUTHER:
 10 Q To your knowledge who else besides Ventura
 11 uses the term "fry" in the trademark?
 12 MR. GARRETT: Calls for speculation. It's
 13 vague.
 14 MR. LUTHER: You can answer.
 15 MR. GARRETT: Talking about any other
 16 retailer? Wholesaler? Manufacturer? Of any kind?
 17 MR. LUTHER: Any use whatsoever.
 18 MR. GARRETT: Like Kentucky Fried Chicken?
 19 MR. LUTHER: Any use whatsoever to your
 20 knowledge.
 21 MR. GARRETT: To the extent you can answer, go
 22 ahead.
 23 THE WITNESS: No idea.
 24 MR. LUTHER: Okay.
 25 Q Now, pertaining to the Mel-Fry mark, what does

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1 "Mel" mean or describe?
 2 A I believe it's an arbitrary term, does not tie
 3 to anything with the actual shortening.
 4 Q Is it an acronym for something?
 5 A Not to my knowledge.
 6 Q Do you know what the term "fry" means or
 7 describes?
 8 MR. GARRETT: Again, vague to the extent it's
 9 -- you are talking in the Mel-Fry context; correct?
 10 MR. LUTHER: Any context.
 11 Q What does fry -- let me finish my question,
 12 please.
 13 What does "fry" mean or describe to your
 14 knowledge?
 15 A It's a preparation method of food.
 16 Q Okay.
 17 To your knowledge what does the term "pig fry"
 18 mean or describe?
 19 MR. GARRETT: For the record, p-i-g, second
 20 word, f-r-y?
 21 MR. LUTHER: Correct.
 22 THE WITNESS: My interpretation would be
 23 frying a pig.
 24 BY MR. LUTHER:
 25 Q To your knowledge what does the term French

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1 fry mean or describe?
 2 A Fried potatoes.
 3 Q To your knowledge what does the term "chicken
 4 fry" mean or describe?
 5 MR. GARRETT: You can answer.
 6 THE WITNESS: It's a preparation method.
 7 BY MR. LUTHER:
 8 Q Fried chicken? Is that what you mean?
 9 A Chicken fried steak. Doesn't have to be
 10 chicken.
 11 Q To your -- that was my next question.
 12 To your knowledge what does the term "French
 13 fried potatoes" mean or describe?
 14 A Fried potatoes.
 15 Q Okay.
 16 And you testified to the chicken fried steak.
 17 Okay.
 18 Pertaining to the Mel-Fry design which you
 19 are familiar with you testified to, why did Ventura
 20 choose common descriptive elements for use in the
 21 label?
 22 MR. GARRETT: It's compound. It's
 23 argumentative and calls for a legal conclusion. Also
 24 calls for speculation.
 25 To the extent you can answer the question, you

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1 may do so.
 2 THE WITNESS: Wasn't a part of the
 3 organization when the decision was made.
 4 MR. LUTHER: Okay.
 5 Q So you have no idea -- you testified -- strike
 6 that question. Okay.
 7 Pertaining to the Mel-Fry --
 8 MR. GARRETT: Before a question is pending,
 9 I'd like to take a short break real quickly if I could.
 10 MR. LUTHER: Off the record.
 11 MR. GARRETT: Thanks.
 12 (Brief recess.)
 13 BY MR. LUTHER:
 14 Q Mr. Splane -- am I pronouncing that right?
 15 A Yes, sir.
 16 Q Pertaining to the Mel-Fry product, can you
 17 tell me what kind of containers that product is put
 18 into, please.
 19 A Yes. 35 pound jug. Three 10-quart pack. And
 20 a twin pack, two 17-and-a-half pound.
 21 Q Is that jug referred to as an F-style jug?
 22 A Which jug?
 23 Q That Mel-Fry is put into.
 24 A There's three that it's put into.
 25 Q Is Mel-Fry put into a 10-quart jug?

<p>Page 49</p> <p>1 A Yes.</p> <p>2 Q Is that an F-style jug?</p> <p>3 A I have never heard it referred to as that.</p> <p>4 MR. LUTHER: I want to introduce Exhibit 5.</p> <p>5 (Defendant's Exhibit 5 was marked</p> <p>6 for identification by the Certified</p> <p>7 Shorthand Reporter.)</p> <p>8 BY MR. LUTHER:</p> <p>9 Q Do you see the front page, Mr. Splane?</p> <p>10 MR. GARRETT: Go ahead and take a look at it.</p> <p>11 MR. LUTHER: Right now I'm just referring to</p> <p>12 the front page of document SU 100149.</p> <p>13 MR. GARRETT: For the record this is a --</p> <p>14 looks like a document printed from the Internet at</p> <p>15 www.containerandpackaging.com. Actually correction.</p> <p>16 It looks like two different websites.</p> <p>17 Did you intend to mark both of these? Looks</p> <p>18 like one is -- the first three pages are from</p> <p>19 bestcontainers.com. And the last three pages are from</p> <p>20 containerandpackaging.com.</p> <p>21 MR. LUTHER: Well, looks like they got stapled</p> <p>22 together. Let's make Exhibit 5 SU 100149 to SU 100151.</p> <p>23 Okay. And we will make Exhibit 6 the next</p> <p>24 one.</p> <p>25 (Defendant's Exhibit 6 was marked</p>	<p>Page 51</p> <p>1 Q Is -- the first bottle is referred to as 2.5</p> <p>2 gallon white F-style. Is that similar to the bottle</p> <p>3 used for the -- is that similar to the jug used for the</p> <p>4 Mel-Fry product?</p> <p>5 A It's not discernible --</p> <p>6 MR. GARRETT: Calls for speculation.</p> <p>7 THE WITNESS: And it's not discernible in the</p> <p>8 shot. I -- there's no boundaries around the bottle. I</p> <p>9 can't tell.</p> <p>10 BY MR. LUTHER:</p> <p>11 Q You can't tell?</p> <p>12 A I can't tell.</p> <p>13 Q And you can't tell from the last one either?</p> <p>14 A Didn't state that.</p> <p>15 Q Can you tell from the last one? On that page.</p> <p>16 MR. GARRETT: Referring to B140 on --</p> <p>17 MR. LUTHER: I am referring to exhibit --</p> <p>18 THE REPORTER: Wait, wait, wait, wait.</p> <p>19 (Discussion held off the record.)</p> <p>20 MR. LUTHER: I am referring to Exhibit 6, the</p> <p>21 designation B140, 32 ounce.</p> <p>22 THE WITNESS: There is not enough definition</p> <p>23 in the shot.</p> <p>24 MR. LUTHER: So you can't tell from -- okay.</p> <p>25 We will go on to the next one.</p>
<p>Page 50</p> <p>1 for identification by the Certified</p> <p>2 Shorthand Reporter.)</p> <p>3 BY MR. LUTHER:</p> <p>4 Q Can we have -- we are looking at Exhibit 5.</p> <p>5 Do you see the first -- do you see the container on the</p> <p>6 first page of Exhibit 5, Mr. Splane?</p> <p>7 A Yes.</p> <p>8 Q Is that the type of container used for</p> <p>9 Mel-Fry?</p> <p>10 A With the small picture, yes, it looks very</p> <p>11 similar.</p> <p>12 Q Okay.</p> <p>13 Now let's to Exhibit 6. And this would be</p> <p>14 document SU 100152.</p> <p>15 MR. GARRETT: If I could interject a belated</p> <p>16 objection to the extent it calls for speculation, the</p> <p>17 prior question and answer.</p> <p>18 Go ahead.</p> <p>19 BY MR. LUTHER:</p> <p>20 Q We are now on Exhibit 6, SU 100152, first</p> <p>21 page. Do you see several bottles there exhibited,</p> <p>22 Mr. Splane?</p> <p>23 MR. GARRETT: You can answer the question.</p> <p>24 THE WITNESS: Yes.</p> <p>25 BY MR. LUTHER:</p>	<p>Page 52</p> <p>1 There is Exhibit 7.</p> <p>2 (Defendant's Exhibit 7 was marked</p> <p>3 for identification by the Certified</p> <p>4 Shorthand Reporter.)</p> <p>5 BY MR. LUTHER:</p> <p>6 Q We have Exhibit 7. This starts with SU 100156</p> <p>7 through -- sequentially through to SU 100163.</p> <p>8 MR. GARRETT: Again, if I could, Counselor, it</p> <p>9 appears as though the last page, which is 100163 is</p> <p>10 from a separate website. Do you want to mark it as</p> <p>11 eight?</p> <p>12 MR. LUTHER: Eight it is.</p> <p>13 (Defendant's Exhibit 8 was marked</p> <p>14 for identification by the Certified</p> <p>15 Shorthand Reporter.)</p> <p>16 MR. GARRETT: For the record, Exhibit 7 is</p> <p>17 a -- appears to be a five-page -- excuse me -- a</p> <p>18 six-page printout from www.thecarycompany -- spelled</p> <p>19 with a "C" -- dot com. And Exhibit 8 is a one-page</p> <p>20 printout from the website w-w-w dot i-l-l-i-n-g,</p> <p>21 company, dot com.</p> <p>22 MR. LUTHER: Okay.</p> <p>23 Q Mr. Splane, let's go to Exhibit 7. Do you see</p> <p>24 the first page of Exhibit 7?</p> <p>25 A Yes.</p>

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1 Q And you see a series of containers there?
 2 A Yes.
 3 Q Do you see the jug in the middle?
 4 A Yes.
 5 Q Is that similar to the product that Mel-Fry is
 6 used with?
 7 MR. GARRETT: Is it similar? You are
 8 referring to the one, two, three -- sixth jug in?
 9 MR. LUTHER: Yes.
 10 MR. GARRETT: From the left?
 11 MR. LUTHER: Yes.
 12 THE WITNESS: It appears to be, yes.
 13 MR. LUTHER: Okay.
 14 Q Can we go to page three of seven. That is
 15 document SU 100158. Do you see the last two jugs
 16 illustrated on this document, Mr. Splane?
 17 A Yes.
 18 Q Okay.
 19 Is the first one similar to the one used -- to
 20 the jug used with the Mel-Fry product?
 21 MR. GARRETT: The -- which size Mel-Fry
 22 product, just to be clear?
 23 MR. LUTHER: The jug illustrated in the
 24 middle.
 25 MR. GARRETT: The 10-quart?

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1 THE WITNESS: (No audible response.)
 2 MR. GARRETT: Just so we are referring to the
 3 10-quart. He referred to three of them.
 4 Go ahead.
 5 THE WITNESS: Looks similar, yes.
 6 BY MR. LUTHER:
 7 Q Now let's go back to question I just asked, SU
 8 100158, and which shows three jugs. You see these
 9 three jugs?
 10 A Yes.
 11 Q Okay.
 12 Now, do you see a jug that's second down from
 13 the first jug?
 14 A Yes.
 15 Q Is that jug similar to the one used with the
 16 Mel-Fry product?
 17 MR. GARRETT: Again, it's vague.
 18 Go ahead.
 19 MR. LUTHER: You can answer.
 20 THE WITNESS: As previously stated, yes,
 21 similar.
 22 MR. LUTHER: Okay.
 23 Q Let's go to up document eight. Do you see in
 24 the first -- document eight is SU 100163.
 25 Do you see any jugs depicted in this exhibit

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1 which is similar to the jug used with the Mel-Fry
 2 product?
 3 MR. GARRETT: Again, it's vague to the extent
 4 the Mel-Fry product is packaged in three different
 5 jugs.
 6 Go ahead.
 7 THE WITNESS: Yes.
 8 BY MR. LUTHER:
 9 Q And which ones?
 10 A The ones in this scale that look most similar
 11 to the Mel-Fry three 10-quart are number three and
 12 number four.
 13 Q Okay. Let's go on.
 14 Now, the Mel-Fry design which is at issue in
 15 this lawsuit shows a basket of fried foods. Is that
 16 correct?
 17 A Correct.
 18 MR. GARRETT: It's vague. You are referring
 19 to the label?
 20 MR. LUTHER: I said "design."
 21 Q Now, are you aware of any other designs or
 22 labels which use a basket with fried foods?
 23 MR. GARRETT: Calls for speculation. It's
 24 also vague.
 25 MR. LUTHER: You can answer.

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1 THE WITNESS: Yes.
 2 BY MR. LUTHER:
 3 Q How many?
 4 A One.
 5 Q Just one? You answered. Which one? Who
 6 makes it? Strike that.
 7 Who makes it?
 8 For the record, if we have any more
 9 interference, we are going to go ask the judge to
 10 reschedule this deposition and have plaintiff pay for
 11 it again. If the plaintiff's counsel keeps giving hand
 12 signals and chuckling after each question.
 13 MR. GARRETT: For the record --
 14 MR. LUTHER: You can shut your mouth. Now we
 15 are going to go on the next question.
 16 MR. GARRETT: Counselor.
 17 MR. LUTHER: Who --
 18 MR. GARRETT: Counselor, for the record, I did
 19 nothing more than chuckle because you asked the same
 20 question three different times.
 21 MR. LUTHER: I will ask it a hundred different
 22 times.
 23 MR. GARRETT: For the record --
 24 MR. LUTHER: Now, who --
 25 MR. GARRETT: For the record, if you continue

<p>Page 57</p> <p>1 to badger the witness, be argumentative, and be this</p> <p>2 aggressive in this deposition, all unnecessarily, we</p> <p>3 will get up and walk away and you can feel free to call</p> <p>4 the judge.</p> <p>5 You are here to ask your questions; we are</p> <p>6 here to answer your questions. However, we do not have</p> <p>7 to take your abuse, nor do we have to take this</p> <p>8 attitude. It may be appropriate in Chicago, but it is</p> <p>9 not here. So please --</p> <p>10 MR. LUTHER: Don't chuckle anymore. Okay? Do</p> <p>11 me a favor --</p> <p>12 MR. GARRETT: -- take a deep breath.</p> <p>13 MR. LUTHER: -- and keep your chuckling to</p> <p>14 yourself. No, next question.</p> <p>15 MR. GARRETT: Take a deep breath.</p> <p>16 BY MR. LUTHER:</p> <p>17 Q Who to your knowledge also uses a basket of</p> <p>18 fried foods in their advertising?</p> <p>19 MR. GARRETT: Calls for speculation.</p> <p>20 MR. LUTHER: You can answer.</p> <p>21 MR. GARRETT: It's vague.</p> <p>22 You may answer the question.</p> <p>23 THE WITNESS: Yeah, two-part question, Supreme</p> <p>24 with their Mega-Fry. Don't know that they advertise.</p> <p>25 This will be Exhibit No. 9, I believe.</p>	<p>Page 59</p> <p>1 A No.</p> <p>2 Q Can you tell me who else does?</p> <p>3 A The reason we are sitting here, Supreme and</p> <p>4 Mega-Fry.</p> <p>5 MR. LUTHER: And you know of -- okay.</p> <p>6 I will make this document number ten.</p> <p>7 (Defendant's Exhibit 10 was marked</p> <p>8 for identification by the Certified</p> <p>9 Shorthand Reporter.)</p> <p>10 MR. GARRETT: Can we go off the record?</p> <p>11 (Discussion held off the record.)</p> <p>12 BY MR. LUTHER:</p> <p>13 Q Exhibit 10. This is SU 100007. Are you</p> <p>14 familiar with the Whole Harvest product, Mr. Splane?</p> <p>15 A Yes.</p> <p>16 Q Is that manufactured by Ventura?</p> <p>17 A No, it is not.</p> <p>18 Q Is this container yellow?</p> <p>19 A In this shot it appears to be translucent.</p> <p>20 Q And that would make the product yellow in</p> <p>21 color?</p> <p>22 A I don't believe it has any impact on the</p> <p>23 product itself.</p> <p>24 MR. GARRETT: That is a vague question.</p> <p>25 BY MR. LUTHER:</p>
<p>Page 58</p> <p>1 (Defendant's Exhibit 9 was marked</p> <p>2 for identification by the Certified</p> <p>3 Shorthand Reporter.)</p> <p>4 MR. LUTHER: Exhibit 9 is SU 100118 through</p> <p>5 SU 100120.</p> <p>6 Q Do you see the first page, Mr. Splane?</p> <p>7 MR. GARRETT: Feel free to take a look at the</p> <p>8 document. Take your time.</p> <p>9 For the record, this is a three-page document</p> <p>10 printed from the Internet from www.foodprocessing.com.</p> <p>11 MR. LUTHER: Okay.</p> <p>12 Q Do you see the first page, Mr. Splane?</p> <p>13 MR. GARRETT: Are you finished reading the</p> <p>14 document?</p> <p>15 THE WITNESS: No, I'm not yet.</p> <p>16 BY MR. LUTHER:</p> <p>17 Q I am going to direct your attention to the</p> <p>18 picture on the first page. Do you see that?</p> <p>19 A Yes.</p> <p>20 Q Does it show fried foods?</p> <p>21 A Yes.</p> <p>22 Q Let's go to the next document.</p> <p>23 By the way, to your knowledge is Ventura the</p> <p>24 only distributor of liquid shortening that uses a</p> <p>25 yellow container?</p>	<p>Page 60</p> <p>1 Q If you put a yellow-colored product into a</p> <p>2 translucent jug, what would be the resulting color of</p> <p>3 the product?</p> <p>4 A It doesn't create yellow, but it is yellow by</p> <p>5 its nature.</p> <p>6 Q Okay.</p> <p>7 A But the jug itself is obviously not yellow.</p> <p>8 MR. LUTHER: Let's go to the next document.</p> <p>9 (Defendant's Exhibit 11 was marked</p> <p>10 for identification by the Certified</p> <p>11 Shorthand Reporter.)</p> <p>12 BY MR. LUTHER:</p> <p>13 Q Exhibit 11 is SU 100008. Do you see the</p> <p>14 products depicted in Exhibit 11, Mr. Splane?</p> <p>15 A Yes.</p> <p>16 Q Are you familiar with any of the names?</p> <p>17 A I am not.</p> <p>18 Q What color are the products in the front row?</p> <p>19 A All products in the front row of this family</p> <p>20 shot I would call them gold in nature.</p> <p>21 MR. LUTHER: Let's go on to the next exhibit.</p> <p>22 (Defendant's Exhibit 12 was marked</p> <p>23 for identification by the Certified</p> <p>24 Shorthand Reporter.)</p> <p>25 MR. LUTHER: Exhibit 12 is SU 100001.</p>

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1 Q Do you see the products depicted in this
 2 exhibit, Mr. Splane?
 3 A Yes.
 4 Q What color are the products depicted in this
 5 exhibit?
 6 A There is a range. But I would say they are
 7 primarily gold.
 8 MR. LUTHER: Let's go on to the next exhibit.
 9 (Defendant's Exhibit 13 was marked
 10 for identification by the Certified
 11 Shorthand Reporter.)
 12 MR. LUTHER: This is exhibit SU 100002.
 13 Q Do you see the products depicted in this
 14 exhibit, Mr. Splane?
 15 A Yes.
 16 MR. GARRETT: Again for the record, I would
 17 object that all of these questions are vague to the
 18 extent you are asking product. Is the product -- you
 19 referred previously to the container. Are you
 20 referring to the liquid or the product? When you say
 21 "product," I am confused as to what you are referring
 22 to exactly.
 23 MR. LUTHER: The product depicted, the color.
 24 MR. GARRETT: In other words, the container,
 25 the whole --

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1 MR. LUTHER: The product depicted in the
 2 exhibit.
 3 MR. GARRETT: Okay.
 4 BY MR. LUTHER:
 5 Q Do you see the product depicted in this
 6 exhibit, Mr. Splane?
 7 A Yes.
 8 Q Starting from the left there are five jugs I
 9 believe. Do you see that?
 10 A Yes.
 11 Q What color are they?
 12 A What color are the jugs?
 13 Q Yes.
 14 A I would say the jugs appear to be clear.
 15 Q What color is the product in the jugs?
 16 A Gold.
 17 MR. LUTHER: Let's go on to the next one,
 18 Exhibit 14.
 19 (Defendant's Exhibit 14 was marked
 20 for identification by the Certified
 21 Shorthand Reporter.)
 22 MR. LUTHER: This is exhibit SU 100003.
 23 Q Do you see the products depicted in this
 24 exhibit, Mr. Splane?
 25 A Yes.

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1 Q Do you see there are two rows, a top row and a
 2 bottom row?
 3 A Yes.
 4 Q May I refer to the left, top row. Do you see
 5 a jug there similar to the one used for the Mel-Fry
 6 product?
 7 A Yes.
 8 Q Do you see a label that says C-A-M-A-R?
 9 A I see a label that says something close to
 10 that. Again, it's not -- the quality is not all that
 11 high. So I can't make it out that specifically.
 12 Q Are you familiar with a liquid shortening
 13 product of that name?
 14 A I am not.
 15 Q What color is the product depicted -- what
 16 color is the jug we are referring to right now?
 17 A It appears to be a translucent jug.
 18 Q And what color is the product within the jug?
 19 A Gold.
 20 Q And what are the colors of the other products
 21 directly next to it in that upper left-hand corner?
 22 A The one directly to the left, which appears to
 23 be a taller gallon, again gold, looks to be a clear
 24 jug. The two products to the left of that look to be
 25 solid colored stand-up pouches. Can't see any product

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1 within them.
 2 Q Okay.
 3 May we go to the bottom row. We're going to
 4 go all the way over to the right in the bottom row. Is
 5 that a jug -- do you see the jug there?
 6 A Yes.
 7 Q Is that similar to the one used with the
 8 Mel-Fry product?
 9 A Similar. Appears to be wider and squatter.
 10 Q Can you tell us what color it is?
 11 A Appears to be translucent.
 12 Q Does it have a label on it?
 13 A Yes.
 14 Q What color is the label?
 15 A Bright yellow.
 16 Q Let's go back to the top row, left. Do you
 17 see a jug -- I am referring to the jug there that's
 18 similar to the Mel-Fry jug, do you see that?
 19 A Yes.
 20 Q What color is the label?
 21 A Bright yellow and orange.
 22 MR. LUTHER: Let's go to the next exhibit.
 23 (Defendant's Exhibit 15 was marked
 24 for identification by the Certified
 25 Shorthand Reporter.)

<p>Page 65</p> <p>1 MR. LUTHER: This is document SU 100004.</p> <p>2 Q Do you see a product depicted in this exhibit,</p> <p>3 Mr. Splane?</p> <p>4 A Yes.</p> <p>5 Q What color is the product?</p> <p>6 A The product itself appears to be goldish in a</p> <p>7 clear jug.</p> <p>8 MR. LUTHER: Let's go on to the next exhibit.</p> <p>9 (Defendant's Exhibit 16 was marked</p> <p>10 for identification by the Certified</p> <p>11 Shorthand Reporter.)</p> <p>12 MR. LUTHER: This is exhibit SU 100006.</p> <p>13 Q Are you familiar with a product called</p> <p>14 Sunfoil, Mr. Splane?</p> <p>15 A I am not.</p> <p>16 Q Do you see the product depicted in this</p> <p>17 exhibit?</p> <p>18 A Yes.</p> <p>19 Q And what color are the products depicted in</p> <p>20 this exhibit?</p> <p>21 A They are a multitude of colors.</p> <p>22 Q Okay.</p> <p>23 Is there a yellow product depicted in this</p> <p>24 exhibit?</p> <p>25 A Yes.</p>	<p>Page 67</p> <p>1 MR. GARRETT: This whole thing?</p> <p>2 MR. LUTHER: Correct. We can refer to each</p> <p>3 individual document by -- how can we?</p> <p>4 MR. GARRETT: These don't have Bates numbers</p> <p>5 on them. It looks like the last three pages --</p> <p>6 MR. LUTHER: Have Bates numbers?</p> <p>7 MR. GARRETT: Correct. They don't have a</p> <p>8 Bates numbers on them. Neither do any of these pages.</p> <p>9 These are all printouts from web pages.</p> <p>10 MR. LUTHER: Well, I got to talk to this</p> <p>11 associate here.</p> <p>12 MR. GARRETT: Do you know if these have been</p> <p>13 produced or not?</p> <p>14 MR. LUTHER: If they don't have a Bates number</p> <p>15 on it, they haven't been produced.</p> <p>16 MR. GARRETT: Okay.</p> <p>17 MR. LUTHER: Can we keep the whole thing</p> <p>18 together and -- as Exhibit 18?</p> <p>19 MR. GARRETT: I would only object to the</p> <p>20 extent that if they haven't been produced I'm not sure</p> <p>21 whether or not in the context of this litigation you</p> <p>22 are allowed to use them. But that's fine. If you</p> <p>23 would like to use 18, all -- for the record one, two,</p> <p>24 three -- first five pages of this exhibit are from a</p> <p>25 printout from w-w-w dot s-a-p-o-r-i-t-o foods, dot</p>
<p>Page 66</p> <p>1 Q Are there golden products depicted in this</p> <p>2 exhibit?</p> <p>3 A Yes.</p> <p>4 MR. LUTHER: Let's go on to the next exhibit.</p> <p>5 (Defendant's Exhibit 17 was marked</p> <p>6 for identification by the Certified</p> <p>7 Shorthand Reporter.)</p> <p>8 MR. LUTHER: This is exhibit SU -- 17 is SU</p> <p>9 100009.</p> <p>10 Q Do you see a product depicted in this exhibit,</p> <p>11 Mr. Splane?</p> <p>12 A Yes.</p> <p>13 Q Does -- can you tell me what the color of the</p> <p>14 product is? Products are, excuse me.</p> <p>15 A Product appears to be gold, again in a clear</p> <p>16 jug.</p> <p>17 MR. LUTHER: Okay.</p> <p>18 (Defendant's Exhibit 18 was marked</p> <p>19 for identification by the Certified</p> <p>20 Shorthand Reporter.)</p> <p>21 MR. GARRETT: Counselor, do you see that</p> <p>22 these --</p> <p>23 MR. LUTHER: Yeah, Exhibit 18 is different Web</p> <p>24 pages, but I'd like to keep it all together as a</p> <p>25 conglomeration and call it all Exhibit 18.</p>	<p>Page 68</p> <p>1 com.</p> <p>2 The last three pages appear to be from a -- a</p> <p>3 foreign company's website, clubentrepot, p-o-t.</p> <p>4 MR. LUTHER: Okay.</p> <p>5 Q Do you see the first page, Mr. Splane?</p> <p>6 A Yes.</p> <p>7 Q Are you familiar with a company called</p> <p>8 Saporito Foods?</p> <p>9 A No.</p> <p>10 Q And do you see three products depicted on page</p> <p>11 one of exhibit -- of this exhibit?</p> <p>12 A Yes.</p> <p>13 Q Can you tell me what the color of the product</p> <p>14 to the left is?</p> <p>15 A It's almost a greenish gold.</p> <p>16 Q And the product to the right?</p> <p>17 A Light beige.</p> <p>18 Q Okay.</p> <p>19 Can we go to the next page of this exhibit.</p> <p>20 You see products depicted at the top there?</p> <p>21 A Yes.</p> <p>22 Q Okay.</p> <p>23 Can you tell me what the colors of the two</p> <p>24 products to the left are?</p> <p>25 A Gold.</p>

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1 Q Can you tell me what the color of the product
2 all the way to the right is?

3 MR. GARRETT: The one that's cut off?

4 MR. LUTHER: Yes.

5 THE WITNESS: Very bright yellow.

6 BY MR. LUTHER:

7 Q Can we go to the next page of this exhibit.

8 Oh, excuse me, excuse me.

9 Okay. We are going to go to one, two, three

10 -- the fourth page of this exhibit. Do you see a

11 depiction of a 20 kilogram cube to the right?

12 A Yes.

13 Q And do you see text underneath it?

14 A Yes.

15 Q And does the text say "heavy duty solid
16 shortening"?

17 MR. GARRETT: For the record, the text is cut
18 off because this is a printout from a website. And the
19 document speaks for itself.

20 If you would like to read what you can read
21 from there, feel free.

22 THE WITNESS: No, I don't see "heavy duty." I
23 see "high performance."

24 MR. LUTHER: Okay.

25 Q Do you see a label on this cube?

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1 A I see that there is a label, yes.

2 Q What color is the label?

3 A Bright yellow.

4 MR. LUTHER: Let's go to --

5 MR. GARRETT: Counselor, if I could interject
6 -- if you'd like, I will do it off the record.

7 MR. LUTHER: Sure. Off the record.

8 (Discussion held off the record.)

9 MR. GARRETT: We are on page whatever of
10 Exhibit 18?

11 MR. LUTHER: We are going to go to another
12 exhibit.

13 (Defendant's Exhibit 19 was marked
14 for identification by the Certified
15 Shorthand Reporter.)

16 MR. LUTHER: This is Exhibit 19. And it's a
17 series of --

18 MR. GARRETT: Again has two different
19 websites.

20 MR. LUTHER: -- series of documents.

21 MR. GARRETT: I'm sorry to interrupt.

22 MR. LUTHER: Oh, go ahead.

23 MR. GARRETT: None of these are also marked
24 with Bates numbers. I don't believe any of these have
25 been produced to date.

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1 MR. LUTHER: Well, we are producing them today
2 as deposition exhibits.

3 MR. GARRETT: If you'd -- okay.

4 I will object to the extent they have not
5 already been produced. I seem to recall -- I could be
6 incorrect; I will look at a break. But I -- I will let
7 it in for this limited purpose. But I believe that
8 only documents already produced are to be used at
9 deposition.

10 Go ahead.

11 MR. LUTHER: Did you see that in an order?

12 MR. GARRETT: As I said, I may be incorrect.

13 I'm making the objection to the extent there is
14 something out there. If there's not -- but you may ask
15 questions.

16 MR. LUTHER: If you want to institute a
17 running objection, that's okay with me.

18 MR. GARRETT: To the extent -- correct. Thank
19 you.

20 To the extent you introduce any documents
21 today that have not been produced, that's my objection.

22 MR. LUTHER: Okay. That's fine.

23 MR. GARRETT: You want to use all these even
24 though they are from different --

25 MR. LUTHER: Yeah, I want to go through them

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1 one by one.

2 MR. GARRETT: Okay. So these are all
3 Exhibit 19.

4 MR. LUTHER: Yes.

5 Q Do you see the second page of Exhibit 19,
6 Mr. Splane?

7 A Yes.

8 Q Do you see a picture of fried foods?

9 A Yes.

10 Q Okay.

11 Can we go to page four of this exhibit. Do
12 you see a picture of fried foods?

13 A Yes.

14 Q Okay.

15 Can we go to -- I guess page six of this
16 exhibit. Do you see a picture of fried foods?

17 A Yes.

18 Q All right.

19 Can we go to the last page of this exhibit.
20 Do you see a picture of fried foods?

21 A Yes.

22 MR. LUTHER: Next exhibit.
23 (Defendant's Exhibit 20 was marked
24 for identification by the Certified
25 Shorthand Reporter.)

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1 MR. GARRETT: Is there only one?
 2 MR. LUTHER: Oh, sorry, sorry, sorry.
 3 MR. GARRETT: That's all right.
 4 MR. LUTHER: This hasn't been produced.
 5 Doesn't have Bates numbers on it. This is going to be
 6 deposition Exhibit 20.
 7 MR. GARRETT: Counselor, do you note that they
 8 appear to be two totally separate things? Do you want
 9 to keep them as one?
 10 MR. LUTHER: Yes. Yes, I want to keep them as
 11 one.
 12 MR. GARRETT: Okay.
 13 BY MR. LUTHER:
 14 Q The first page, Mr. Splane?
 15 A Yes.
 16 Q Are you familiar with the Spectra company?
 17 A No.
 18 Q Okay.
 19 And do you see products depicted on the first
 20 page of this exhibit?
 21 A Yes.
 22 Q Are some of those products yellow in color?
 23 A Very bright yellow, yes.
 24 Q Can we go to the second page of this exhibit.
 25 Do you see the top where it says "vegetable oils"?

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1 A Yes.
 2 Q Below that to you see a yellow product?
 3 A The Alfa product? Yes.
 4 Q Okay.
 5 Can we go to the fourth page of this exhibit.
 6 No. Excuse me.
 7 Let's go to the next exhibit.
 8 (Defendant's Exhibit 21 was marked
 9 for identification by the Certified
 10 Shorthand Reporter.)
 11 BY MR. LUTHER:
 12 Q Mr. Splane, who is E-T-A Mel-Fry?
 13 MR. GARRETT: The question is "who is?"
 14 MR. LUTHER: Yes.
 15 MR. GARRETT: Okay.
 16 THE WITNESS: This is the first I've heard of
 17 them. Appears to be in Australia.
 18 BY MR. LUTHER:
 19 Q Who is Goodman Fielder, do you know?
 20 A Do not.
 21 Q Do you see two products depicted to the left?
 22 A Yes.
 23 Q Do you see "Mel, hyphen, Fry" in one of the
 24 depictions?
 25 A Yes.

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1 MR. LUTHER: Let's go to the next exhibit.
 2 (Defendant's Exhibit 22 was marked
 3 for identification by the Certified
 4 Shorthand Reporter.)
 5 BY MR. LUTHER:
 6 Q Do you see the first page of Exhibit 22,
 7 Mr. Splane?
 8 A Yes.
 9 Q Can you see down at the bottom it says ADM?
 10 A Yes.
 11 Q You have testified that you know who ADM is.
 12 They are a competitor?
 13 A Yes.
 14 Q Did you know that they use the color yellow to
 15 advertise their shortenings?
 16 MR. GARRETT: Calls for speculation. Vague.
 17 Actually just vague.
 18 MR. LUTHER: You can answer.
 19 THE WITNESS: I see yellow on the front page.
 20 Don't know that it's the consistent yellow color
 21 through all their communications.
 22 BY MR. LUTHER:
 23 Q Can we go to the last page. Do you see the
 24 color yellow here?
 25 A Multiple colors of yellow, yes, and orange.

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1 MR. LUTHER: Let's go to the next --
 2 THE REPORTER: Could we take a short break.
 3 MR. LUTHER: Go ahead.
 4 (Brief recess.)
 5 BY MR. LUTHER:
 6 Q Mr. Splane, can you tell me what is more
 7 effective advertising, French fries or fried carrots?
 8 MR. GARRETT: Calls for speculation. It's
 9 vague.
 10 MR. LUTHER: Can you answer?
 11 THE WITNESS: More effective in advertising?
 12 What am I advertising?
 13 MR. LUTHER: Liquid shortening.
 14 THE WITNESS: Then clearly it would be French
 15 fries.
 16 BY MR. LUTHER:
 17 Q Now, would you ever advertise lamb chops being
 18 fried in liquid shortening?
 19 A Would we ever?
 20 Q Yes.
 21 A If it were a common use in a market we are
 22 going after, yes.
 23 Q Is it a common use?
 24 A Today no.
 25 MR. LUTHER: Okay. Now let's on to the next

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1 document.
 2 (Defendant's Exhibit 23 was marked
 3 for identification by the Certified
 4 Shorthand Reporter.)
 5 MR. LUTHER: 23 has been produced. It is SU
 6 100015. Looks like my associate got this one right,
 7 it's all one web page.
 8 Q Do you see a picture up in the upper
 9 right-hand corner depicting yellow products?
 10 A Yes.
 11 Q Are you familiar with the company called Moi,
 12 M-o-i?
 13 A Looks to be from Malaysia. No, I'm not.
 14 MR. LUTHER: Okay. Let's go on to the next
 15 exhibit.
 16 (Defendant's Exhibit 24 was marked
 17 for identification by the Certified
 18 Shorthand Reporter.)
 19 MR. LUTHER: This has been produced as SU
 20 100087.
 21 Q Do you see a picture in the upper left-hand
 22 corner?
 23 A Yes.
 24 Q Are those French fries in a basket?
 25 A French fries falling out of a basket.

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1 MR. LUTHER: Let's go to the next exhibit.
 2 (Defendant's Exhibit 25 was marked
 3 for identification by the Certified
 4 Shorthand Reporter.)
 5 MR. LUTHER: This has been produced as SU
 6 100125.
 7 Q Do you see a picture of French fries
 8 advertised here?
 9 A I see a picture of French fries, not
 10 necessarily advertised.
 11 MR. LUTHER: Let's go to the next exhibit.
 12 (Defendant's Exhibit 26 was marked
 13 for identification by the Certified
 14 Shorthand Reporter.)
 15 MR. LUTHER: This has been produced as SU
 16 100128.
 17 MR. GARRETT: Do you have a copy for me?
 18 MR. LUTHER: Oh, sorry.
 19 MR. GARRETT: No worries.
 20 BY MR. LUTHER:
 21 Q Do you see a picture on the first page of this
 22 exhibit, Mr. Splane?
 23 A Yes.
 24 Q Is it a box of French fries?
 25 A Container of French fries, yes.

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1 Q With a yellow background?
 2 A Gradated dark orange to yellow.
 3 MR. LUTHER: Okay. Let's go to the next
 4 exhibit.
 5 (Defendant's Exhibit 27 was marked
 6 for identification by the Certified
 7 Shorthand Reporter.)
 8 MR. LUTHER: This exhibit is a series of --
 9 looks like different Web pages. But the documents are
 10 numbered SU 100130 sequentially through to SU 100134.
 11 Q Do you see the first page of this exhibit,
 12 Mr. Splane?
 13 A Yes.
 14 Q Do you see fried foods being depicted?
 15 A Yes.
 16 Q Can we go to the third page. And it looks
 17 like -- excuse me.
 18 Do we see a series of pictures here on the
 19 left-hand side?
 20 A Yes.
 21 Q Are they fryers?
 22 A Yes.
 23 Q Are there fried foods in the fryers?
 24 A I believe so, yes.
 25 MR. LUTHER: Let's go to the next exhibit.

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1 (Defendant's Exhibit 28 was marked
 2 for identification by the Certified
 3 Shorthand Reporter.)
 4 MR. LUTHER: This has been produced as SU
 5 100088 through 100089.
 6 Q Do you see the first page of this exhibit,
 7 Mr. Splane?
 8 A Yes.
 9 Q Does it show French fries in a fryer?
 10 A Yes.
 11 MR. LUTHER: Next exhibit.
 12 (Defendant's Exhibit 29 was marked
 13 for identification by the Certified
 14 Shorthand Reporter.)
 15 MR. GARRETT: Can we go off the record
 16 briefly?
 17 MR. LUTHER: Yes.
 18 (Discussion held off the record.)
 19 MR. LUTHER: This is Exhibit 29. We see the
 20 first page.
 21 Q We see the first page of this exhibit,
 22 Mr. Splane?
 23 A Yes.
 24 Q Are those French fries in a basket?
 25 A Looks to be steak fries, yes.

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1 (Defendant's Exhibit 30 was marked
2 for identification by the Certified
3 Shorthand Reporter.)
4 MR. LUTHER: This has been produced as SU
5 100014.
6 Q Do you see the products in the upper
7 left-hand corner?
8 A Yes.
9 Q Right in the middle is there a jug similar to
10 the Mel-Fry jug?
11 A Appears to be similar, yes.
12 Q What color is that?
13 A Bright yellow.
14 Q Let's go to the next exhibit.
15 To your knowledge is the phrase "long
16 lasting" used with the Mel-Fry product?
17 A Yes.
18 Q Do you know how long it has been used?
19 A Don't know the extent of the length. It has
20 been on there for the last two years that I'm aware of.
21 Q Has it ever been used -- to your knowledge has
22 it ever been used with any other product in any other
23 industry?
24 MR. GARRETT: Calls for speculation. It's
25 vague.

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1 THE WITNESS: Yeah, broad question. Not to my
2 knowledge.
3 MR. LUTHER: Okay. Next exhibit.
4 (Defendant's Exhibit 31 was marked
5 for identification by the Certified
6 Shorthand Reporter.)
7 MR. LUTHER: This has been produced as SU
8 100106 and SU 100107.
9 Q Do you see the upper left-hand corner it says
10 Stride?
11 A Yes.
12 Q Does it say "the ridiculously long lasting
13 gum" underneath it?
14 A It does.
15 MR. LUTHER: Let's go to the next exhibit.
16 (Defendant's Exhibit 32 was marked
17 for identification by the Certified
18 Shorthand Reporter.)
19 MR. LUTHER: This exhibit has been produced
20 as SU 100108 through -- sequentially through SU
21 100110.
22 Q And on the first page right in the middle,
23 Mr. Splane, it says "view all products by Shiseido."
24 Do you see that?
25 A Yes.

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1 Q Then it says "the makeup stick foundation"?
2 A Uh-huh.
3 Q And the first sentence directly under that at
4 the end, do you see the term "long-lasting"?
5 A Yes.
6 MR. LUTHER: Let's go to the next exhibit.
7 (Defendant's Exhibit 33 was marked
8 for identification by the Certified
9 Shorthand Reporter.)
10 MR. LUTHER: This has been produced as SU
11 100113 and SU 100114.
12 Q You see the first page of this document,
13 Mr. Splane?
14 A Yes.
15 Q And it says "Lenox launch their longest
16 lasting blades"?
17 A Yes.
18 Q Now I have some questions.
19 This is -- the next exhibit is a document
20 production by Ventura, 0001 sequentially through to
21 00056. And I will be making reference to particular
22 documents.
23 MR. GARRETT: I believe some of those
24 documents are marked confidential. There is only a
25 few. But to the extent you are asking him about those,

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1 let's be sure to mark the section of the transcript
2 confidential, please.
3 (Discussion held off the record.)
4 MR. LUTHER: For the record, I am referring
5 to these production numbers. And when I refer to a
6 particular number, we will make that an individual
7 exhibit. How's that?
8 MR. GARRETT: That's fine. So do you want to
9 not mark this Exhibit 34 then?
10 MR. LUTHER: Yeah, we are not marking this as
11 an exhibit yet.
12 MR. LUTHER: Let's go to VF 00016, about
13 halfway through.
14 MR. GARRETT: Are we marking this as an
15 exhibit?
16 MR. LUTHER: This will be Exhibit 34.
17 Q Do you see a bunch of Ventura's products here,
18 Mr. Splane?
19 A Yes, sir.
20 Q Do see a Mel-Fry product smack dab in the
21 middle there?
22 A Yes.
23 Q Why is that label different than the label at
24 issue in this lawsuit?
25 MR. GARRETT: It's vague. Calls for

<p style="text-align: right;">Page 85</p> <p>1 speculation.</p> <p>2 THE WITNESS: Which label are you</p> <p>3 specifically referring to?</p> <p>4 MR. LUTHER: Mel-Fry next to the --</p> <p>5 THE WITNESS: In the 35 pound jug?</p> <p>6 MR. LUTHER: Yeah.</p> <p>7 MR. GARRETT: One that says 40025 at the top</p> <p>8 of the jug?</p> <p>9 MR. LUTHER: No.</p> <p>10 Q Next to that, to the left. Do you see that?</p> <p>11 A The one behind the Marie's salad dressing</p> <p>12 bottle?</p> <p>13 Q Yes.</p> <p>14 A By looking at this reproduction I can't tell</p> <p>15 you that it is different. There is not enough</p> <p>16 information here.</p> <p>17 Q Well, you can simply see that there is no</p> <p>18 French fries on it; right?</p> <p>19 A I can't see that. It looks as though there is</p> <p>20 something in the basket to me.</p> <p>21 Q You can see a basket on there?</p> <p>22 A Sticking out to the right of the Marie's</p> <p>23 bottle, yes.</p> <p>24 (Defendant's Exhibit 34 was marked</p> <p>25 for identification by the Certified</p>	<p style="text-align: right;">Page 87</p> <p>1 correct.</p> <p>2 Q And why haven't you provided these documents?</p> <p>3 MR. GARRETT: Argumentative. Misstates the</p> <p>4 prior testimony. Assumes facts not in evidence. And</p> <p>5 object to the extent again this witness may or may not</p> <p>6 know what has been produced by counsel.</p> <p>7 MR. LUTHER: You can answer.</p> <p>8 MR. GARRETT: You can answer if you can.</p> <p>9 BY MR. LUTHER:</p> <p>10 Q I take it you can't answer the question?</p> <p>11 A I can't answer the question. I'm not sure if</p> <p>12 they were requested.</p> <p>13 Q Who would have these documents?</p> <p>14 A We would house them within our City of</p> <p>15 Industry R&D facilities.</p> <p>16 Q City of Industry in Los Angeles?</p> <p>17 A In Los Angeles County, correct.</p> <p>18 Q Is Ventura's liquid shortening products</p> <p>19 superior could all other liquid shortening products to</p> <p>20 your knowledge?</p> <p>21 A Not to all other, no.</p> <p>22 Q How do you know this?</p> <p>23 A There are similar products on the market.</p> <p>24 Q Do you have documents showing this?</p> <p>25 MR. GARRETT: It's vague.</p>
<p style="text-align: right;">Page 86</p> <p>1 Shorthand Reporter.)</p> <p>2 MR. LUTHER: Next exhibit. Let's go to VF</p> <p>3 00025. Okay.</p> <p>4 Q And see Mel-Fry's design here in a jug; is</p> <p>5 that correct?</p> <p>6 A Correct.</p> <p>7 Q Do see we "clearly superior" stated at the</p> <p>8 top?</p> <p>9 A Yes.</p> <p>10 Q What does "superior" mean?</p> <p>11 A I would interpret it as high quality.</p> <p>12 Q So to your knowledge there can be a superior</p> <p>13 liquid shortening?</p> <p>14 MR. GARRETT: Misstates the prior testimony,</p> <p>15 to the extent it's a separate question.</p> <p>16 MR. LUTHER: Strike that. Let me ask again.</p> <p>17 Q Can there be a superior liquid shortening?</p> <p>18 A In the context of the shortening category</p> <p>19 there are superior shortenings when you equate it to</p> <p>20 fry life, which is how we look at the business.</p> <p>21 Q To your knowledge is Ventura's liquid</p> <p>22 shortening superior?</p> <p>23 A To various other products, yes.</p> <p>24 Q Do you have documents supporting this?</p> <p>25 A We run lab tests that document fry life,</p>	<p style="text-align: right;">Page 88</p> <p>1 THE WITNESS: (No audible response.)</p> <p>2 MR. LUTHER: "Yes"? He nodded his head yes.</p> <p>3 THE WITNESS: Yes, we should have documents,</p> <p>4 competitive information on that, correct.</p> <p>5 BY MR. LUTHER:</p> <p>6 Q Where are those documents located?</p> <p>7 A Would be housed either at R&D and/or through</p> <p>8 communications that we've gotten from the field point</p> <p>9 of sale materials in our marketing department,</p> <p>10 competitive files.</p> <p>11 MR. LUTHER: Now, will you provide these</p> <p>12 documents?</p> <p>13 MR. GARRETT: You are asking me?</p> <p>14 MR. LUTHER: Yes.</p> <p>15 MR. GARRETT: Whether or not they have been</p> <p>16 requested and/or would otherwise be responsive to</p> <p>17 requests I can't speak to right now.</p> <p>18 MR. LUTHER: Fine. Fair enough.</p> <p>19 Q Is Ventura's liquid shortening product</p> <p>20 superior to Supreme's liquid shortening product?</p> <p>21 MR. GARRETT: In your opinion -- in his</p> <p>22 opinion?</p> <p>23 MR. LUTHER: To his knowledge.</p> <p>24 THE WITNESS: To my knowledge they are very</p> <p>25 similar.</p>

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1 BY MR. LUTHER:
 2 Q How do you know?
 3 A Because they are both fractionated soy
 4 products. And the hydrogenation gives it its
 5 stability.
 6 Q Are there documents showing this, to what you
 7 just testified?
 8 MR. GARRETT: Again, vague. Calls for
 9 speculation.
 10 THE WITNESS: I believe so.
 11 BY MR. LUTHER:
 12 Q And those documents are located where?
 13 A In one of the R&D facilities.
 14 Q So I take it Ventura's use of the term
 15 "superior" is not false advertising?
 16 MR. GARRETT: It's argumentative, calls for a
 17 legal conclusion. It's vague.
 18 You can answer the question.
 19 THE WITNESS: Our sales proposition with
 20 Mel-Fry is to up-sell against commodity products. So
 21 in that context when you are looking at fry life and
 22 the other attributes that come along with Mel-Fry, the
 23 answer is, yes, it is superior to some products on the
 24 market.
 25 BY MR. LUTHER:

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1 Q Up-fry? You mean outfry? Outperform?
 2 A Length of fry life.
 3 Q Is part of that puffing?
 4 A "Puffing"?
 5 MR. GARRETT: Again, objection to the extent
 6 it calls for a legal conclusion. It is a legal term of
 7 art.
 8 Do you understand the term?
 9 THE WITNESS: Do not.
 10 BY MR. LUTHER:
 11 Q Is part of that embellishment?
 12 A No. When compared to commodity products, it's
 13 absolutely substantial.
 14 Q Superior?
 15 A Yes.
 16 Q To all other liquid shortening products?
 17 MR. GARRETT: Misstates prior testimony.
 18 MR. LUTHER: This is a new question.
 19 MR. GARRETT: Can you repeat the question.
 20 MR. LUTHER: The question is -- I will repeat
 21 the question.
 22 Q Is liquid -- excuse me. Is Mel -- let me
 23 start again.
 24 Is the description of the Mel-Fry product
 25 being superior totally accurate?

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1 MR. GARRETT: It is a vague and speculative
 2 question. It also calls for an expert opinion. If you
 3 are asking for this percipient witness's testimony, his
 4 opinion as to whether or not it is a superior product
 5 it's already been asked, and he has answered it.
 6 You can answer it again if you would like.
 7 THE WITNESS: The context of this is the
 8 superiority of Mel-Fry over lower end commodity oils.
 9 BY MR. LUTHER:
 10 Q How about comparable products?
 11 MR. GARRETT: Same objections.
 12 BY MR. LUTHER:
 13 Q Is Mel-Fry -- can you answer?
 14 A Go ahead.
 15 Q I will go to the next one.
 16 Is Mel-Fry superior to comparable products?
 17 MR. GARRETT: In your opinion? That's what
 18 you are asking?
 19 MR. LUTHER: To your knowledge.
 20 MR. GARRETT: This witness is testifying as a
 21 percipient witness. He is not an expert witness. If
 22 you want to ask him what his opinion is or what his
 23 personal knowledge is, that's fine. You are asking him
 24 a legal -- you are asking him whether or not a product
 25 is superior, not putting two products in front of him,

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1 not with two tests, not with data, not with anything.
 2 BY MR. LUTHER:
 3 Q As a company spokesman and an official here
 4 today to testify on behalf of the entire Ventura
 5 company, to your knowledge is Mel-Fry superior to
 6 comparable products?
 7 MR. GARRETT: You may answer the question.
 8 However, again, I object to the extent that that
 9 question -- well, strike that.
 10 You've distorted -- this witness here is here
 11 as a percipient witness designated as a person most
 12 knowledgeable under 30(b)(6) for the company. However,
 13 you are asking him a question that is an opinion
 14 question.
 15 In your lay opinion you may answer the
 16 question in that capacity, which is what is your
 17 opinion about that statement?
 18 THE WITNESS: My opinion goes a little bit of
 19 a different direction. That is, that when we sell
 20 products, we don't sell just the product, but it's a
 21 level of services around the product, which when all
 22 rolled together does present superiority.
 23 BY MR. LUTHER:
 24 Q So owing to Ventura's -- owing to Ventura's
 25 Mel-Fry product being superior is it fair to say that

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1 Ventura's liquid shortening products are well known to
2 its customers in the industry?

3 MR. GARRETT: It's compound. It's vague. I
4 don't think you can answer that question. But to the
5 extent you understand it, you may do so.

6 THE WITNESS: I take it to mean awareness of
7 Mel-Fry in the industry?

8 MR. LUTHER: Yes.

9 THE WITNESS: Is there awareness of Mel-Fry in
10 the industry?

11 MR. LUTHER: Owing to Mel-Fry's superiority.

12 MR. GARRETT: Same objections.

13 MR. LUTHER: You can answer.

14 MR. GARRETT: And it calls for speculation.

15 MR. LUTHER: You can answer.

16 THE WITNESS: We position Mel-Fry as a high
17 performance long-lasting fry shortening. That is our
18 position on it.

19 BY MR. LUTHER:

20 Q Is that what makes it superior?

21 A That in addition to the program sell that
22 revolves around it well beyond the product.

23 Q What is the program? Distribution -- what
24 other factors?

25 A Other factors are tools that we make available

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1 for training on-site, for what we call our DFQM, deep
2 fry quality management kits, extenders, all rolled
3 together do develop a greater proposition. To my
4 knowledge there are not competitors in the market that
5 have that much value tied into the product.

6 BY MR. LUTHER:

7 Q So you have a pretty loyal customer base for
8 the Mel-Fry product; is that correct?

9 MR. GARRETT: Is that a question?

10 MR. LUTHER: I said "is that correct."

11 MR. GARRETT: Calls for speculation.

12 But you can answer the question.

13 THE WITNESS: Mel-Fry is a very stable,
14 growing brand. So that would tell you that, yes.

15 There is loyalty.

16 BY MR. LUTHER:

17 Q So owing to Mel-Fry's superiority is it fair
18 to say that customers who buy it always know that they
19 are buying from Ventura?

20 MR. GARRETT: It calls for speculation. It's
21 vague. And it's compound.

22 You are asking him what -- if he knows what
23 customers think when they are buying the product. Am I
24 understanding correctly?

25 MR. LUTHER: We'll rephrase it.

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1 Q Do customers who buy the Mel-Fry product want
2 a superior product?

3 MR. GARRETT: Same objection.

4 You can answer to the extent you can.

5 THE WITNESS: They are paying more money for a
6 superior product. So I would assume that, yes, they
7 do. Because there are less expensive alternatives on
8 the market.

9 MR. LUTHER: Fair enough.

10 (Discussion held off the record.)

11 (Defendant's Exhibit 35 was marked

12 for identification by the Certified

13 Shorthand Reporter.)

14 BY MR. LUTHER:

15 Q Mr. Splane, I believe you have stated that the
16 Mel-Fry product is clear?

17 A Yes.

18 MR. GARRETT: To clarify, referring to the
19 liquid, the product inside the bottle; correct?

20 BY MR. LUTHER:

21 Q The Mel-Fry liquid shortening product is clear?

22 A The oil itself is clear, 'correct.

23 Q Let's go to VF 00034. Is this -- is there a
24 picture of the Mel-Fry liquid shortening product in the
25 clear container here?

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1 A Yes.

2 Q Now, this is not in color. But does this
3 advertisement show a yellow color?

4 A Can't answer that.

5 MR. GARRETT: That's vague.

6 BY MR. LUTHER:

7 Q Why is the Mel-Fry product advertised here in
8 a clear container?

9 A It's a -- it's a tie to the advertising. It's
10 to break through the clutter, to get people's
11 attention.

12 And I don't know that it's actually Mel-Fry
13 product in a clear jug or if it is a computer
14 generated. It's never sold that way.

15 Q Let me ask you this question.

16 What color would a clear container be if a
17 yellow colored liquid shortening product was put in it?

18 A The clear container would still be clear.

19 Q What color would be the resulting product?

20 A It would be the natural color of the product,
21 a gold.

22 Q If it was a yellow color, would it be yellow?

23 A Yes.

24 Q And what color would a clear container be if a
25 clear colorless product was put inside of it?

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1 A Clear.
 2 Q And why is the Mel-Fry product clear and
 3 colorless?
 4 A In this particular advertisement?
 5 Q No, in general. Why is the Mel-Fry product
 6 clear?
 7 A It is not colorless. It has a natural color
 8 of vegetable oil.
 9 Q Is it clear?
 10 A It is clear, meaning it's not a creamy,
 11 compared to creamy alternatives.
 12 Q Is it translucent?
 13 A I would not call it translucent.
 14 Q In your experience would somebody buy a
 15 blue-colored liquid shortening product?
 16 A The actual oil itself being blue?
 17 Q Yeah.
 18 A I would say that they would not.
 19 Q Would somebody buy a black-colored liquid
 20 shortening product?
 21 A I would say they would not.
 22 Q Would somebody buy an orange-colored liquid
 23 shortening product?
 24 A No.
 25 Q Would somebody buy a golden-colored liquid

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1 Q Because it's a little odd. Is that correct?
 2 A It's a little unusual. It's not the standard.
 3 Q What are the most common colors for liquid
 4 shortening products?
 5 A They are either gold, clear, or creamy.
 6 Q And what would be the color of the resulting
 7 product if a gold, clear, or creamy liquid shortening
 8 product is put in a clear container?
 9 A Gold for the fractionated clear vegetable
 10 oil. More of a -- a white-ish gold on a creamy
 11 product.
 12 Q Well, if these products were put in a clear
 13 container, the resulting product would be the color of
 14 the product; right?
 15 A Correct.
 16 Q Why is the Mel-Fry product put into a yellow
 17 container?
 18 A With my longevity with the company, I'm not
 19 sure why yellow was chosen. Not sure that it has any
 20 actual tie. But it has become well known in the
 21 industry as our product in that yellow jug.
 22 Q So to your knowledge what food product does a
 23 yellow color describe?
 24 MR. GARRETT: Objection. It's vague. Calls
 25 for speculation.

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1 shortening product?
 2 A Yes.
 3 Q Would somebody buy an aqua-colored liquid
 4 shortening product?
 5 MR. GARRETT: Aqua being blue?
 6 THE WITNESS: If that were the standard color
 7 of oil -- in that context if all other oils were aqua,
 8 it would be the standard offering and the answer would
 9 be yes.
 10 BY MR. LUTHER:
 11 Q But it's not the standard, is it?
 12 A Correct.
 13 In the context that we are talking about
 14 today, aqua would stand out as a little bit odd unless
 15 it's got some dramatic benefits and it's something new
 16 and innovative. Going back to all the other colors you
 17 mentioned associated with it, then maybe. But we are
 18 talking very conceptual.
 19 Q Is that the reason somebody would not
 20 particularly want to buy a green-colored liquid
 21 shortening product?
 22 MR. GARRETT: Again, calls for speculation.
 23 THE WITNESS: The reason they would not want
 24 to buy a green is? Restate.
 25 BY MR. LUTHER:

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1 THE WITNESS: What --
 2 MR. GARRETT: In this industry or in any
 3 industry at all?
 4 MR. LUTHER: Let me rephrase the question.
 5 Q In the food industry what color -- what food
 6 product does a yellow color describe?
 7 MR. GARRETT: Same objection.
 8 MR. LUTHER: You can answer.
 9 THE WITNESS: Lemon.
 10 BY MR. LUTHER:
 11 Q What does the term "long-lasting" mean or
 12 describe?
 13 A Describes the hours of fry life that you get
 14 out of a product.
 15 MR. GARRETT: Again, a belated objection,
 16 calls for speculation. Vague.
 17 BY MR. LUTHER:
 18 Q What does the term "longest lasting" mean or
 19 describe?
 20 A The term "longest" to me means that you are
 21 claiming that you are superior to everything else in
 22 the marketplace.
 23 Q Just like Mel-Fry is superior to everything in
 24 the marketplace; is that correct?
 25 MR. GARRETT: It's argumentative.

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1 MR. LUTHER: "No"? Your answer was "No"?
 2 THE WITNESS: Yes.
 3 BY MR. LUTHER:
 4 Q So "superior" does not mean longest lasting?
 5 MR. GARRETT: To clarify the record, he said
 6 "Your answer was 'No'?" And you said "Yes."
 7 Can we go back and read the previous answer so
 8 we can get a correct -- previous question so we can
 9 get a correct answer.
 10 (Record read as follows:
 11 "Question: Just like Mel-Fry is superior
 12 to everything in the marketplace; is that
 13 correct?
 14 "Mr. Garrett: It's argumentative.
 15 "Mr. Luther: 'No'? Your answer was 'No'?
 16 "The Witness: Yes.")
 17 MR. GARRETT: All right. Sorry. We can do
 18 this one of two ways, we can read the second question
 19 before that or can you just reask your question again.
 20 MR. LUTHER: Let's go on to the next question.
 21 MR. GARRETT: Well, I'd like to clarify the
 22 record. Otherwise, we're going to have to do it when
 23 he reviews it. Because I don't think there was clarity
 24 there.
 25 BY MR. LUTHER:

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1 Q Does "longest lasting" mean "superior"?
 2 A Yes.
 3 Q Okay.
 4 Have you seen the term Pro-Fry before, "P-r-o,
 5 hyphen, F-r-y"?
 6 A I have not.
 7 Q Do you have kids?
 8 MR. GARRETT: You can answer question.
 9 THE WITNESS: Yes.
 10 BY MR. LUTHER:
 11 Q Would you let your kids eat green chicken?
 12 A Couple years ago they ate green catsup.
 13 Q Would you like to see them eat green
 14 hamburgers?
 15 A If it's what they want to do and it's healthy
 16 for them.
 17 Q Is that standard in the industry?
 18 MR. GARRETT: Green chickens?
 19 BY MR. LUTHER:
 20 Q We will start with green chickens. Is that
 21 standard in the industry?
 22 A Maybe in some restaurants you don't want to
 23 eat in.
 24 MR. LUTHER: Fair enough. Let's go on to the
 25 next question.

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1 MR. GARRETT: For the record, I've heard of
 2 blue chicken.
 3 MR. LUTHER: Jim, it's not your deposition.
 4 MR. GARRETT: I know. But since we are
 5 talking about colored chickens, I figure it's a good
 6 time to throw it in.
 7 MR. LUTHER: Okay.
 8 Q Now, at some point you became aware of
 9 Supreme's trademark application for Mega-Fry; is that
 10 correct?
 11 MR. GARRETT: You can answer the question.
 12 THE WITNESS: Yes.
 13 BY MR. LUTHER:
 14 Q Why didn't Ventura oppose Supreme's trademark
 15 application for Mega-Fry?
 16 MR. GARRETT: To the extent you can answer
 17 without divulging communications with legal counsel,
 18 you may do so. If your answer is based on those
 19 conversations, I instruct you not to answer.
 20 In other words, if you have some independent
 21 knowledge, you may answer.
 22 THE WITNESS: First time I became aware of it
 23 was in February of this year.
 24 BY MR. LUTHER:
 25 Q First time you became aware of it?

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1 A Correct.
 2 Q How about the first time anybody at Ventura
 3 became aware of it? Can you answer that question?
 4 MR. GARRETT: Calls for speculation.
 5 THE WITNESS: Can't speak to that.
 6 BY MR. LUTHER:
 7 Q So it's true that somebody at Ventura may very
 8 well have been aware of it before you; is that true?
 9 A I say I can't speak to it. I don't have any
 10 knowledge of it.
 11 Q But it is possible; is that correct?
 12 MR. GARRETT: Calls for speculation.
 13 You can answer.
 14 THE WITNESS: Could be possible, yes.
 15 MR. LUTHER: Okay.
 16 Q To your knowledge why did Ventura delay for
 17 six months before bringing this lawsuit after it was --
 18 you know, had found out about the Mega-Fry application?
 19 MR. GARRETT: It's argumentative, assumes
 20 facts not in evidence, misstates the prior testimony.
 21 Calls for speculation.
 22 And to the extent it calls for you to reveal
 23 attorney/client communications I will instruct the
 24 witness not to answer. If you have an independent
 25 knowledge of that, you may do so. And may answer to

<p>Page 105</p> <p>1 the extent you understand the question.</p> <p>2 THE WITNESS: I will choose not to answer</p> <p>3 that.</p> <p>4 BY MR. LUTHER:</p> <p>5 Q Because of attorney/client privilege?</p> <p>6 MR. GARRETT: Is it -- go off the record</p> <p>7 briefly?</p> <p>8 MR. LUTHER: Yes.</p> <p>9 MR. GARRETT: Let's step outside.</p> <p>10 To be clear your question is why to his</p> <p>11 knowledge did -- why was there a delay of six months in</p> <p>12 filing the lawsuit? Is that where we are going?</p> <p>13 MR. LUTHER: After they had knowledge of the</p> <p>14 Mega-Fry application.</p> <p>15 MR. GARRETT: Okay.</p> <p>16 THE WITNESS: And your starting point is</p> <p>17 February?</p> <p>18 MR. GARRETT: Knowledge of the litigation.</p> <p>19 MR. LUTHER: Well, you know what, let me</p> <p>20 strike that question.</p> <p>21 MR. GARRETT: I want to get you an answer if I</p> <p>22 can.</p> <p>23 MR. LUTHER: Let's strike that question. I</p> <p>24 will formulate it a different way.</p> <p>25 While you are up, I was faxed this. Judge</p>	<p>Page 107</p> <p>1 Q Did I ask you why Ventura did not oppose</p> <p>2 Supreme's trademark application for Mega-Fry? Was that</p> <p>3 asked?</p> <p>4 MR. GARRETT: I believe that was asked.</p> <p>5 MR. LUTHER: And you answered you don't know</p> <p>6 why.</p> <p>7 Q Do you know that Supreme has removed all</p> <p>8 offending products from the marketplace?</p> <p>9 A I am not aware of that, no.</p> <p>10 Q Okay.</p> <p>11 Who is the -- who is the CEO of Ventura?</p> <p>12 A Rick Mazer.</p> <p>13 Q Rick Mazer?</p> <p>14 A Richard Mazer.</p> <p>15 MR. GARRETT: Can you spell that for the</p> <p>16 record.</p> <p>17 THE WITNESS: M-a-z-e-r. First name Richard.</p> <p>18 BY MR. LUTHER:</p> <p>19 Q Are you aware of any correspondence, telephone</p> <p>20 correspondence, between Richard Mazer and the CEO of</p> <p>21 Supreme?</p> <p>22 A No.</p> <p>23 Q To your knowledge how is Ventura being harmed</p> <p>24 by Supreme right now?</p> <p>25 MR. GARRETT: Again, just to clarify, you are</p>
<p>Page 106</p> <p>1 handwrote an order. Do you have this? You want to</p> <p>2 make a copy for yourself?</p> <p>3 MR. GARRETT: Due to the urgency plaintiff is</p> <p>4 directed to fully -- what does it say? -- respond?</p> <p>5 MR. LUTHER: Yeah.</p> <p>6 MR. GARRETT: By 5:00 p.m. --</p> <p>7 MR. LUTHER: Yesterday.</p> <p>8 MR. GARRETT: -- October 10th. So ordered.</p> <p>9 And this is respond to discovery request?</p> <p>10 MR. LUTHER: Yeah.</p> <p>11 MR. GARRETT: I believe you were sent</p> <p>12 documents yesterday.</p> <p>13 MR. LUTHER: Do you have a copy of this order?</p> <p>14 Do you want a copy of this?</p> <p>15 MR. GARRETT: Actually if you have a copy,</p> <p>16 great. I'm not sure I do.</p> <p>17 MR. LUTHER: Why don't we make a copy.</p> <p>18 Let's go off the record for a minute.</p> <p>19 Leave it aside.</p> <p>20 MR. GARRETT: We can do it over lunch.</p> <p>21 MR. LUTHER: Or we can just make a copy of</p> <p>22 everything here.</p> <p>23 MR. GARRETT: You want to enter it in when we</p> <p>24 come back on and then just make it an exhibit?</p> <p>25 MR. LUTHER: Could do it that way.</p>	<p>Page 108</p> <p>1 a percipient witness, not an expert witness. I believe</p> <p>2 that calls for a legal conclusion.</p> <p>3 To the extent you answer of your personal</p> <p>4 knowledge that's fine, or your personal understanding.</p> <p>5 THE WITNESS: We believe there is confusion,</p> <p>6 brand confusion, in the industry. And we have very</p> <p>7 strict high standards as it relates to quality control,</p> <p>8 customer service. And anybody who infringes on our</p> <p>9 brands we believe could if -- could lend to a bad taste</p> <p>10 in customers' minds -- or mouths and could spread in --</p> <p>11 not only in our shortening category, but play in a</p> <p>12 multitude of categories, could get that ill will of</p> <p>13 Ventura in general which affects even beyond shortening</p> <p>14 and oils. Can't calculate what that's worth today.</p> <p>15 MR. LUTHER: So to say -- sorry. Are you</p> <p>16 finished?</p> <p>17 THE WITNESS: To me, that's my opinion on it.</p> <p>18 BY MR. LUTHER:</p> <p>19 Q To summarize, is would be fair to say that</p> <p>20 Supreme pays a lot of attention to the quality of its</p> <p>21 products? I mean -- excuse me.</p> <p>22 Ventura pays a lot of attention to the quality</p> <p>23 of its products; is that correct?</p> <p>24 A Yes.</p> <p>25 Q And would it be fair to say that Ventura</p>

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1 keeps a watchful eye out for infringers?
 2 MR. GARRETT: Calls for speculation. It's
 3 also vague.
 4 To the extent you can answer, go ahead.
 5 THE WITNESS: That's why we are sitting here.
 6 MR. LUTHER: Okay.
 7 Let me go on to these documents produced by
 8 Ventura. VF 00050.
 9 MR. GARRETT: This will be 37?
 10 (Discussion held off the record.)
 11 (Defendant's Exhibit 36 was marked
 12 for identification by the Certified
 13 Shorthand Reporter.)
 14 MR. GARRETT: The next will be 37. This is
 15 document, FV 00050.
 16 (Defendant's Exhibit 37 was marked
 17 for identification by the Certified
 18 Shorthand Reporter.)
 19 MR. LUTHER: I want to make it FV 00050
 20 through VF 00052.
 21 BY MR. LUTHER:
 22 Q Mr. Splane, you see FV 00050?
 23 A Yes.
 24 Q Ventura versus Nice Blends?
 25 A Yes.

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1 Q Were you at Ventura at the time of this suit?
 2 A What is the date?
 3 Q Don't know.
 4 2002?
 5 A No.
 6 Q So you wouldn't have any knowledge of this?
 7 A (No audible response.)
 8 MR. LUTHER: Okay.
 9 MR. GARRETT: Well, personal knowledge of
 10 that?
 11 BY MR. LUTHER:
 12 Q Do you have any knowledge whatsoever of it?
 13 A The only knowledge I have is basic, and it was
 14 a suit, trade dress infringement with My-Fry.
 15 Q My-Fry?
 16 A Correct.
 17 Q Okay.
 18 Is My-Fry still a product out there to your
 19 knowledge?
 20 A Not to my knowledge under that name.
 21 Q Why not?
 22 A I believe it settled in our favor.
 23 Q Okay.
 24 Let's go to, Mr. Splane, your declaration of
 25 October 9th.

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1 MR. GARRETT: Are you done with these other
 2 documents by chance?
 3 MR. LUTHER: Which ones are these?
 4 MR. GARRETT: The documents produced by
 5 Ventura.
 6 MR. LUTHER: For now, yes.
 7 MR. GARRETT: We will put them over here so we
 8 don't get them mixed up as exhibits.
 9 MR. LUTHER: Okay.
 10 Q Do you have a copy of your declaration of
 11 October 9th? You don't? I only have the first one.
 12 Well, we will have to do a quick fix here.
 13 MR. GARRETT: Do you want to take an early
 14 lunch and get that done?
 15 MR. LUTHER: You want to start lunch now?
 16 MR. GARRETT: We can do that.
 17 MR. LUTHER: Let's do it. Save some time.
 18 MR. GARRETT: Be back at 12:30?
 19 MR. LUTHER: 12:30.
 20 (LUNCH RECESS.)
 21
 22
 23
 24
 25

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1 LOS ANGELES, CALIFORNIA; THURSDAY, OCTOBER 11, 2007
 2 12:32 p.m.
 3
 4 EXAMINATION (CONTINUED)
 5 BY MR. LUTHER:
 6 Q Mr. Splane, the Mel-Fry design -- is it
 7 correct that is not registered at the U.S. Patent and
 8 Trademark Office?
 9 MR. GARRETT: To the extent you can answer.
 10 It calls for speculation.
 11 Go ahead.
 12 THE WITNESS: Yeah, I don't know that to be
 13 true.
 14 BY MR. LUTHER:
 15 Q You don't know if that's registered or not?
 16 A The design?
 17 Q Yes.
 18 A Not sure.
 19 MR. GARRETT: Just to clarify, when you refer
 20 to the design, you are referring to the entire look of
 21 the bottle, not just the label? Or are you talking
 22 about the Mel-Fry name, the label, the
 23 bottle-name-label combination? What are we talking
 24 about?
 25 BY MR. LUTHER:

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1 Q Are you familiar with the Mel-Fry label which
2 is at issue in this lawsuit?
3 A Yes.
4 Q Is that label registered at the U.S. Patent
5 and Trademark Office?
6 MR. GARRETT: Calls for speculation.
7 To the extent you know.
8 THE WITNESS: Yes, as I understand it,
9 elements are registered, Mel-Fry name. But in terms of
10 registering the entire label, I don't know if that's
11 possible. But there are elements that are registered.
12 BY MR. LUTHER:
13 Q The name Mel-Fry is registered?
14 A Yes.
15 Q So why isn't the entire design registered?
16 MR. GARRETT: Calls for speculation.
17 You can answer to the extent you know.
18 THE WITNESS: Not sure.
19 MR. LUTHER: I may have asked this.
20 Q Does Ventura sell liquid shortening products
21 directly to home consumers?
22 A Directly to home consumers. No.
23 MR. LUTHER: Let's mark as exhibit --
24 whatever number it was.
25 MR. GARRETT: 38.

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1 MR. LUTHER: I immediately forgot as you told
2 me.
3 (Defendant's Exhibit 38 was marked
4 for identification by the Certified
5 Shorthand Reporter.)
6 BY MR. LUTHER:
7 Q Mr. Splane, you are the Terry Splane that
8 signed this declaration?
9 A Yes.
10 Q Executed October 9th, 2007?
11 A Yes.
12 Q Did you write this declaration, Mr. Splane?
13 A Um, was involved in modifying of a draft of
14 this, yes.
15 Q Who wrote the draft?
16 MR. GARRETT: Calls for speculation.
17 THE WITNESS: Came out of our legal department.
18 BY MR. LUTHER:
19 Q In-house or outside counsel?
20 MR. GARRETT: Same objection, calls for
21 speculation.
22 THE WITNESS: Yeah, it was presented to me by
23 in-house. But I'm not sure.
24 BY MR. LUTHER:
25 Q You don't know who wrote it, then?

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1 A Yes.
2 Q Now, pertaining to paragraph two in this
3 declaration -- just, you know, for convenience I am
4 going to refer to paragraphs. But I mean this
5 declaration of October 9th, 2007.
6 A Sure.
7 Q Pertaining to paragraph two, Ventura first
8 learned of a product called Mega-Fry in 2007. To your
9 knowledge how did Ventura learn of Mega-Fry?
10 A It was actually a direct email that came in to
11 me from our sales representative that handles the New
12 York area. And it was with an invoice, a scanned copy
13 of an invoice, that actually said "the new Mel-Fry" was
14 the claim, in parentheses, parenthetical around "the
15 new Mel-Fry" and then Mega-Fry, the brand. And that's
16 really what drew the awareness to it.
17 Q Did it come to your attention or somebody
18 before you?
19 A It came to my attention.
20 Q You were the first one to see it at Ventura?
21 A Correct.
22 Q And that email would be Exhibit 1 of this
23 declaration?
24 A Yes.
25 Q Okay.

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1 And who sent the email?
2 A Earl Leising, our regional manager handling
3 the New York market.
4 Q Oh. He's a regional manager for Ventura?
5 A He's a sales manager, yeah, works directly for
6 Ventura Foods; correct.
7 Q And who are the other names at the top here?
8 A Mike Castagna is a senior category marketing
9 manager reporting to me. Holly Adrian, is a category
10 manager reporting to me.
11 (Discussion held off the record.)
12 THE WITNESS: Holly Adrian, A-d-r-i-a-n.
13 MR. GARRETT: And for the record, Earl Leising
14 is spelled L-e-i-s-i-n-g. Mike Castagna is
15 C-a-s-t-a-g-n-a.
16 Go ahead.
17 THE WITNESS: Holly Adrian, senior category
18 manager reporting to me. Chris Sanna, S-a-n-n-a, is
19 the vice president of sales for the eastern region.
20 Jim Stolle, S-t-o-l-l-e, is the director of strategic
21 pricing. Steve Geske, G-e-s-k-e, is the senior vice
22 president of field sales for Ventura Foods.
23 BY MR. LUTHER:
24 Q And Terry Splane is you?
25 A Correct.

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1 Q And why were all these people copied?
2 MR. GARRETT: Calls for speculation.
3 THE WITNESS: Yeah, I would speculate that
4 Earl wanted to have people aware of the situation.
5 BY MR. LUTHER:
6 Q Well, let me ask you, is it normal company
7 procedure to have this many people copied?
8 MR. GARRETT: Calls for speculation. It's
9 also vague.
10 MR. LUTHER: You can answer.
11 THE WITNESS: Typically in this day and age
12 you seem to copy a lot of people on emails. So it's
13 pretty standard activity, correct.
14 BY MR. LUTHER:
15 Q Now, does everything in your business call for
16 speculation and is it vague? Is your operation of your
17 business speculative and vague? "Yes" or "No."
18 A No.
19 Q Okay. Then when you copy people, is it
20 speculative and vague? "Yes" or "No."
21 MR. GARRETT: Are you -- objection. Are
22 you -- it's argumentative.
23 Are you referring to my objection?
24 MR. LUTHER: I am asking him a new question.
25 Q When you copy people in the normal course of

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1 your work, is it speculative and vague?
2 MR. GARRETT: And I am going to object that
3 it's argumentative. You are raising your voice again.
4 And the reason for clarification that it's
5 speculative and vague is that you asked whether or
6 not -- why Earl Leising would have copied this many
7 people. How would this witness know whether or not --
8 why Earl Leising copied this many people?
9 BY MR. LUTHER:
10 Q I am going to ask you once again. In the
11 normal course of your business is it speculative and
12 vague for other people to be copied on emails?
13 MR. GARRETT: Asked and answered.
14 MR. LUTHER: "Yes" or "No." You can answer.
15 Don't look at him. He can't coach you.
16 THE WITNESS: I don't understand the question.
17 Could you rephrase it? Please.
18 MR. LUTHER: Let's go on to the next
19 question.
20 Q Who -- this invoice came from Wonder Foods; is
21 that right?
22 A Correct.
23 Q Who at Wonder Foods sent the invoice?
24 A I have no knowledge of who at Wonder Foods
25 would have sent the invoice.

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1 Q How did this Earl guy get ahold of it?
2 MR. GARRETT: Calls for speculation.
3 BY MR. LUTHER:
4 Q You don't know?
5 A I believe it from our broker representative in
6 the market.
7 Q So it's the email that's speculative and
8 vague; is that correct?
9 MR. GARRETT: It's argumentative.
10 BY MR. LUTHER:
11 Q Is it correct? Is that correct this email is
12 speculative?
13 A It houses specific information that's not
14 speculative and vague, which is this invoice.
15 Q Okay. Let's see.
16 Now, on paragraph two, it says Mega-Fry;
17 right?
18 A Correct.
19 Q So you had no knowledge of "Mega, hyphen,
20 Fry," in 2007; is that correct?
21 A I would assume Mega-Fry -- "Mega, hyphen, Fry"
22 -- it's not in the proper trademark context here, but
23 it refers to the exact same product.
24 Q Okay.
25 Did I ask -- I asked you how many in-house

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1 counsel. I think you said two?
2 A Correct.
3 Q Did I ask you their names?
4 A No.
5 Q May I have their names, please.
6 A John Poggi, P-o-g-g-i. And Dan McCarrol.
7 Q How old is he -- what's the first guy's
8 name? John?
9 A John.
10 Q How old is he?
11 A How old is he?
12 Q Yes.
13 A A guess would put him at late 50s.
14 Q Oh. So he's been practicing law for some
15 time?
16 A I would believe so, yes.
17 Q How about the second fellow you named?
18 A I would put Dan at late 40s.
19 Q So he probably has been practicing law for
20 some time?
21 A I would imagine so, yes.
22 Q Are these good attorneys?
23 MR. GARRETT: Calls for speculation. It's
24 also vague.
25 MR. LUTHER: Well, let me strike that.